TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 27

WM. H. MOORE, JR., TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF SASSARD & KIMBALL, INC., BANKRUPT, PETITIONER,

vs.

O. S. BAY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,695).

(35,695)

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellant:

CRAIG & WELLER, Board of Trade Building, Los Angeles, California.

For Appellee:

SYLVAN G. BAY, 712 Rowan Building, Los Angeles, California.

In the United States District Court of the Southern District of California, Central Division.

IN BANKRUPTCY—No. 14,101-M.

In the Matter of SASSARD & KIMBAL, INC., Bankrupt.

PETITION FOR REVIEW OF FINAL ORDER OF REFEREE.

To the Honorable RUPERT B. TURNBULL, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

I.

That on or about the 15th day of January, 1930, an order to show cause was issued out of the above-entitled court, directing Sylvan G. Bay to show cause why an order should not be made decreeing a chattel mortgage executed by Sassard & Kimbal, Inc., Bankrupt herein, in favor of Sylvan G. Bay to be void and of no force and effect as to the

creditors of the said Sassard & Kimbal, Inc., Bankrupt, and the Trustee in Bankruptcy hereafter to be elected.

II.

That on the 23d day of January, 1930, a hearing was had on said order to show cause and it was stipulated by and between counsel that said order to show cause be deemed effective as against O. S. Bay, assignee of the chattel mortgage and that said O. S. Bay legal holder of the note and chattel mortgage submitted himself to the jurisdiction of the above-entitled court.

III.

Upon the hearing of the order to show cause why an order prayed for in the petition of the receiver Wm. H. Moore, Jr., should not be granted, a final order was made by the said Referee as follows, to wit, a copy of which is herewith attached to this petition for review and made a part hereof. [1*]

That said order was, and is, erroneous in the following respects, to wit:

1. That the conclusions of law, to wit:

"That the chattel mortgage executed as aforesaid in favor of Sylvan G. Bay, and subsequently assigned to Dr. O. S. Bay is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and for the reason that there was no notice of intention *to* chattel mortgage recorded as required by Sec-

*Page-number appearing at the foot of page of original certified Transcript of Record.

tion 3440 of the Civil Code, State of California";

are not supported by the findings of fact nor the evidence, and that the conclusion of law is erroneous and against the law.

2. That the conclusions of law, to wit:

"That said chattel mortgage is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him for the reason that there was no immediate recordation of said mortgage, same having been kept off record for a period of fourteen days, without any circumstances justifying said delay."

is erroneous and against the law and the evidence.

WHEREFORE, petitioner prays that said order be reviewed and modified in the following particulars, to wit:

1. That it be decreed that said chattel mortgage, executed by Sassard & Kimbal, Inc., bankrupt herein be adjudged a valid and existing lien against all property covered thereby as against Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and against all the world.

2. That it be decreed that said chattel mortgage be adjudged a valid and existing lien against all property covered thereby, as against all creditors of Sassard & Kimball, Inc., bankrupt herein, that became such creditors subsequent to December 19, 1928, and against Wm. H. Moore, Jr., Trustee, as to those creditors represented by him which said

creditors became such subsequent to December 19, 1928.

3. That said order be reviewed and modified [2] as provided in the bankruptcy law of 1898 and Amendment thereto and General Order Number 27.

O. S. BAY,
Petitioner.

SYLVAN G. BAY,
Attorney for Petitioner.

State of California,
County of Los Angeles,—ss.

Sylvan G. Bay, being by me first duly sworn, deposes and says: that he is the attorney for the petitioner herein in the above-entitled matter, that he is entirely familiar with all the facts and circumstances surrounding this matter and has read the foregoing petition and known the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

SYLVAN G. BAY.

Subscribed and sworn to before me this 3d day of February, 1930.

[Seal] CHARLES REICHE,
Notary Public in and for the County of Los Angeles, State of California. [3]

[Title of Court and Cause.]

ORDER DECLARING CHATTEL MORTGAGE OF DR. O. S. BAY INVALID AND VOID AS TO THE TRUSTEE.

A petition having been filed by Wm. H. Moore, Jr., Receiver, for an order to show cause directing Sylvan G. Bay to appear before the undersigned Referee in Bankruptcy and show cause why an order should not be made declaring a certain chattel mortgage executed in favor of Sylvan G. Bay on December 5th, 1928, and recorded December 19th, 1928, in Book 7383, page 159 of Official Records of the County of Los Angeles, State of California, void and invalid as to Wm. H. Moore, Jr., Trustee, and as to creditors of Sassard & Kimball, Inc., and said order to show cause having been issued and a hearing on same having taken place on the 23d day of January, 1930, and prior to said hearing Dr. O. S. Bay, assignee of the aforesaid chattel mortgage, appearing in person and through his attorney, Sylvan G. Bay, and consenting to the jurisdiction of the court and to be bound by any decision with respect to the validity of said chattel mortgage.

Now, after due consideration of the evidence and authorities presented, all of the facts set forth in the petition of Wm. H. Moore, Jr., with the exception of Paragraph VIII, having been stipulated to be correct, and it having been stipulated that said chattel mortgage was executed on December

5th, [4] 1928, notwithstanding an answer filed by Sylvan G. Bay disputing certain of the facts as set forth,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the chattel mortgage executed as aforesaid, in favor of Sylvan G. Bay and subsequently assigned to Dr. O. S. Bay, is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and for the reason that there was no notice of intention to chattel mortgage recorded as required by Section 3440 of the Civil Code, State of California; and for the further reason that there was no immediate recordation of said mortgage, same having been kept off record for a period of fourteen days without any circumstances justifying said delay.

Dated: At Los Angeles, California, this 27th day of January, 1930.

RUPERT B. TURNBULL,
Referee in Bankruptcy. [5]

[Endorsed]: Filed Feb. 6, 1930, at 15 min. past 9 o'clock A. M.

Received copy of the within this 3 day of February, 1930.

CRAIG & WELLER,
Attorney for Trustee [6]

[Title of Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW.

I, Rupert B. Turnbull, one of the Referees in Bankruptcy at Los Angeles, California, hereby certify that in the above-entitled matter, the bankrupt was duly adjudicated on the 31st day of December, 1929; that the first meeting of creditors was duly had on the 27th day of January, 1930, and after due notice to creditors thereof, and at said first meeting of creditors, Wm. H. Moore, Jr., was duly elected Trustee of the estate of the bankrupt, filed his bond in the sum of Ten Thousand ($10,000.00) Dollars, the amount suggested by the creditors and the amount required by the Court, which bond was duly approved.

That prior to the election of a Trustee, an order was duly made appointing Wm. H. Moore, Jr., as Receiver, which order was made by this Referee and the said Receiver qualified thereupon on the 31st day of December, 1929.

That prior to the election of a Trustee, the Receiver filed his petition for an order to show cause, upon which petition the Referee made an order requiring Sylvan G. Bay to show cause on January 21, 1930, at 2:00 o'clock P. M., why your Referee should not make an order declaring chattel mortgage executed by the bankrupt, Sassard & Kimball, Inc., as mortgagor, in favor of Sylvan G. Bay, mortgagee, to be void and of no force and effect.

That on the 23d day of January, 1930, the hearing was had on said order to show cause, and the Trustee appeared by his counsel, Messrs. Craig & Weller, James P. Keleher of counsel; Sylvan G. Bay appeared for himself, he being an attorney at law, and it [7] was stipulated that said proceeding might go forward to all effects and purposes as if O. S. Bay had been named as one of the respondents, that O. S. Bay appeared, submitted to the jurisdiction of the Referee with respect to the subject matter of the order to show cause, appeared by his counsel, Sylvan G. Bay, and submitted himself to the jurisdiction of the above-entitled court.

It was stipulated by the counsel for the Trustee and by Sylvan G. Bay and O. S. Bay that, notwithstanding the denials contained in the answer of Sylvan G. Bay, the following facts were true:

1st. That on the 23d day of November, 1928, and all times thereafter, up to the date of bankruptcy, December 31, 1929, the bankrupt was a merchant engaged in selling automobiles, automobile parts and accessories, with its place of business at 6054 Pacific Boulevard, Huntington Park, California.

2d. That the Receiver was appointed on December 31, 1929, and immediately thereafter came into possession of all the furniture, show room equipment and shop equipment of the bankrupt, situated at 6054 Pacific Boulevard, Huntington Park, California, together with one Ford Roadster, license 190395, one Studebaker Big Six service car, California 1928 license 83241, and that at all times

the Receiver had been in possession from and after the date of the appointment of said Receiver.

3d. That on November 23, 1938, more than a year prior to the bankruptcy of the bankrupt, the bankrupt had made, executed and acknowledged a chattel mortgage in favor of Sylvan G. Bay as mortgagee, said mortgage being dated November 23, 1928, acknowledged November 30, 1928, affidavit of good faith executed on December 5, 1928, but which was not recorded until December 19, 1928.

4th. It was stipulated that December 5, 1928, at the time the last act was done with respect to the execution of said mortgage, to wit, the affixing of the affidavit of good faith [8] thereon, was the date to be considered as the date of the making of said mortgage.

5th. It was further stipulated that at the date of the making and execution of said mortgage, on December 5, 1928, there were existing creditors of said Sassard & Kimball, Inc., who were then unpaid and are now unpaid. That said creditors who were creditors prior to the time of the execution of said mortgage, have remained continuously since said times, and at all times since and up to the date of the filing of the petition in bankruptcy herein, and are now unpaid creditors of the bankrupt. That other and additional creditors have come into being, to wit, creditors of the bankrupt since the making of the said mortgage on December 5, 1928, and between said date and the date of recording, December 19, 1928, that said

creditors are unpaid. It was further stipulated that after the recording of said mortgage on December 19, 1928, other and additional creditors came into being, continued to exist and now exist as unpaid creditors of the bankrupt. It was expressly stipulated that the three (3) sets of creditors as to point of time still exist, that is to say, creditors who had become creditors prior to December 5, 1928, creditors who became creditors between the date of the making of the mortgage and the date of the recording thereof, and third, the creditors who had come into existence since the date of the recording of the mortgage.

6th. It was further stipulated that prior to the making and execution of said mortgage, that is to say, prior to December 5, 1928 and thereafter no notice of intention to mortgage a stock in trade of a merchant, or fixtures and equipment of a merchant, to wit, the stock in trade or fixtures of the bankrupt was made, was executed or was recorded in the office of the County Recorder of Los Angeles County, California, either pursuant to Section 3440 of the Civil Code of the State of California, or at all. [9]

The Referee finds that Huntington Park, California, and the place of business of the bankrupt at 6054 Pacific Boulevard were at all times within the County of Los Angeles, State of California, and the stock in trade of the bankrupt and the fixtures and equipment of the bankrupt at all the times herein mentioned were in the county of Los Angeles, State of California.

No reason or excuse of any kind was given or urged by the respondents as to explain the failure to record said chattel mortgage between the date of its execution, December 5, 1928, and the date of its recording, December 19, 1928. No reason was assigned for failure to comply with Section 3440, Civil Code of the State of California.

The matter was submitted to your Referee for decision by the respective parties.

It was argued by counsel for Sylvan G. Bay and O. S. Bay that said mortgage was valid as against all creditors of the bankrupt subsequent to the date of the recordation of said mortgage, and it was argued that your Referee should find that a division should be made of the creditors as represented by the Trustee into classes, that as against all creditors prior to the date of recording that the mortgage should be held void, and as all creditors after the date of recording, should be held valid. It was argued a dividend should be declared to one class of creditors and denied to the other.

The Referee concluded that the mortgage was invalid for three (3) reason:

First—that it had been kept off of record for a substantial period of time and that said period of time did not constitute an immediate recording as required by law.

Second—that said mortgage was void by reason that there had been no compliance with Section 3440, Civil Code of the State of California. [10]

Third—that said mortgage was void as to the Trustee for the reason that it was stipulated that there were valid existing, unpaid creditors of the bankrupt prior to the execution of the mortgage, and also that there were creditors created between the time the mortgage was executed and the time that the same was recorded.

Whereupon, the Referee made an order declaring the chattel mortgage invalid and void as to the Trustee and creditors generally as represented by the Trustee, which order is in words and figures as follows:

"In the District Court of the United States for the Southern District of California, Central Division.

IN BANKRUPTCY—No. 14101-M.

In the Matter of SASSARD & KIMBAL, INC., Bankrupt.

ORDER DECLARING CHATTEL MORTGAGE OF DR. O. S. BAY INVALID AND VOID AS TO THE TRUSTEE.

"A petition having been filed by Wm. H. Moore, Jr., Receiver, for an order to show cause directing Sylvan G. Bay to appear before the undersigned Referee in Bankruptcy and show cause why an order should not be made declaring a certain Chattel Mortgage executed in favor of Sylvan G. Bay on December 5th, 1928, and recorded December

19th, 1928, in Book 7383, Page 159 of Official Records of the County of Los Angeles, State of California, void and invalid as to Wm. H. Moore, Jr., Trustee and as to creditors of Sassard & Kimbal, Inc., and said order to show cause having been issued and a hearing on same having taken place on the 23rd day of January, 1930, and prior to said hearing Dr. O. S. Bay, Assignee of the aforesaid chattel mortgage, appearing in person and through his Attorney, Sylvan G. Bay, and consenting to the jurisdiction of the Court and to be bound by any decision with respect to the validity of said chattel mortgage,

"Now, after due consideration of the evidence and authorities presented, all of the facts set forth in the petition of Wm. H. Moore, Jr., with the exception of Paragraph VIII, having been stipulated to be correct, and it having been stipulated that said chattel mortgage was executed on December 5th, 1928, notwithstanding an answer filed by Sylvan G. Bay disputing certain of the facts as set forth,

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Chattel Mortgage executed as aforesaid, in favor of Sylvan G. Bay and subsequently assigned to Dr. O. S. Bay, is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and for the reason that there was no notice of intention to chattel mortgage recorded as required by Section 3440 of the Civil Code, State of California; and for the further reason that there was no immediate recor-

dation of said mortgage, same having been kept off record for fourteen days without any [11] circumstances justifying said delay.

"Dated: At Los Angeles, California, this 27th day of January, 1930.

"(Signed) RUPERT B. TURNBULL,
"Referee in Bankruptcy."

Thereupon, the mortgagees, Sylvan G. Bay and O. S. Bay, feeling themselves aggrieved, filed a petition for review of said order.

The Referee transmits with this certificate the said original petition for review of final order of Referee. There were no exhibits introduced, the evidence all coming in by stipulation of the parties as above recited.

No transcript of the evidence has been prepared because none has been requested by any of the parties and no fees have been deposited for preparing such transcript. If transcript is desired, same may be obtained from H. A. Singeltary, whose address is 672 Subway Terminal Building, Los Angeles, California.

Dated, at Los Angeles, California, this 4th day of February, 1930.

RUPERT B. TURNBULL,
Referee in Bankruptcy. [12]

[Endorsed]: Filed Feb. 6, 1930, at 15 min. past 9 o'clock A. M. [12-a]

[Title of Court and Cause.]

MEMORANDUM ON PETITION TO REVIEW.

On December 5, 1928, the bankrupt executed a chattel mortgage to petitioner covering certain personal property, stock in trade, office furniture and equipment used in its business. This chattel mortgage was filed for record fourteen days after its execution. There was a failure to comply with the provisions of Section 3440, Civil Code of California, providing that a chattel mortgage "will be conclusively presumed to be fraudulent and void as against the existing creditors of the * * * mortgagor, unless at least seven days before the consummation of such * * * mortgage the mortgagor * * * shall record in the office of the county recorder * * * a notice of said intended * * * mortgage," setting out the particulars of its proposed effect and its purpose.

By stipulation, it is agreed that at the time of the filing of the voluntary petition in bankruptcy, there were creditors of three classes:

1. Those existing at the time of the execution of the mortgage.
2. Those arriving at the status of creditors during the interval between the execution and the recordation.
3. The holders of claims coming into existence subsequent to the recordation.

As a chattel mortgage is considered to be in effect, a transfer of title, recording is necessary in order

to meet [13] the law of California that a transfer of title not accompanied by immediate delivery is deemed fraudulent, and it seems to be the law, therefore, that the recordation of a chattel mortgage, to be effective against creditors, must immediately follow the execution, wherefore it is conceded here as will hereafter appear, that the creditors reaching that status in the interval of fourteen days between the execution and recordation in the instant case are not affected by the mortgage, the delay being regarded as unreasonable.

The Referee held that the mortgage was void against creditors of each of the classes. It is conceded that this is true as to those in the first two categories, but the petitioner contends that as to those creditors coming into being subsequent to the date of recordation, December 19, 1928, the mortgage is good, and this is the issue before the Court.

The first inquiry is then as to how, in this respect, the mortgage is regarded by the law of California. We have already quoted from a pertinent statute. (Sec. 3440, Civil Code.) Another section (Sec. 2957, Civil Code) provides that a mortgage shall be void "against * * * subsequent purchasers and encumbrancers * * * unless:

(1) It is accompanied by a certain appropriate affidavit.

(2) It is properly acknowledged.

This mortgage satisfied both of these conditions.

It seems to be settled in California that the instant encumbrance is good against all creditors whose claims did not come into existence until after

its recordation. Section 3440, we think, upon principle, does not affect its right to recordation, and as this act favors only "existing creditors," that is, those in that status at its recordation, it does not support the Referee's conclusion against subsequent creditors. [14] Section 2957 precludes the thought that once recorded, it is void against subsequently created interests, because neither of the two incidents, omission of either of which would avoid it, is absent. The statement of conditions which would avoid excludes any other reason. In effect, it is good against subsequent creditors by the settled law of the state as indicated, among other cases, by the decisions in Ruggles vs. Cannedy, 127 Cal. 290, and United Bank and Trust Company vs. Powers, 265 Pac. 403. Many cases are cited to us in the briefs as supporting a contrary view, to which we have given careful attention, the last being Noyes, Trustee, vs. Bank of Italy, Vol. 77, Cal. Dec. 179, but upon their facts these cases are very clearly distinguishable. In fact, we do not consider them to apply at all.

In 1910, the bankruptcy act was amended to make clear the position of the Trustee. It seems to have been the theory of the Referee that the effect of this amendment, which gave the Trustee the status of an execution creditor, so far affected the status of the creditors of each of the three classes, as against the mortgage, as to place them all on the same level of superiority. In this we are very clear that the Referee was wrong. There is nothing whatever in the cause for, or the language of the amendment

of 1910 to produce such a result. The Trustee indeed represents all creditors, but only as their respective interests in the property under administration were fixed by local law when the bankruptcy proceedings intervened, and it is his duty to administer and distribute accordingly as he finds at that time liens or inferiorities of respective creditors were established. If at that time any creditors had no inchoate right under existing state laws to reduce his claim to judgment and thereby establish a lien by execution superior to an existing and recorded mortgage, he [15] is bound in distribution to recognize the latter's superior position. It is said, as a settled law in federal courts, that there is so much of local nature entering into chattel mortgages that federal courts accept as decisive the state law fixing the priority of such encumbrance. Etheridge vs. Sperry, 139 U. S. 266. See, also, In re Baxter and Co., 154 Fed. 22; and Union Bank of Chicago vs. Kansas City Bank, 136 U. S. 223.

The petition to review therefore should be, and is allowed, and an order appropriate to these conclusions is directed to be entered giving the mortgage priority over the creditors of the 3d class.

With exceptions to the Trustee.

JOHN M. KILLITS,
United States District Judge.

Dated at Los Angeles, California, April 24, 1930.

[Endorsed]: Filed Apr. 24, 1930, at 10 min. past 2 o'clock P. M. [16]

At a stated term, to wit, the February Term, A. D. 1930, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Thursday, the 24th day of April, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable JOHN M. KILLITS, District Judge *pro tem.*

[Title of Cause.]

MINUTES OF COURT—APRIL 24, 1930—ORDER ALLOWING PETITION TO REVIEW, ETC.

The Court this date having filed memorandum on petition to review Referee's order; in accordance with said memorandum, the petition to review is allowed and an order is directed to be entered giving the mortgage priority over the creditors of the third class. Exception is allowed to the Trustee. [17]

[Title of Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AGAINST SYLVAN G. BAY.

Comes now Wm. H. Moore, Jr., and respectfully represents and shows to the Court:

I.

That your petitioner is the duly appointed, qualified and acting Receiver in Bankruptcy in the above-entitled matter.

II.

That the bankrupt herein was on November 23, 1928, and at all times thereafter up to December 31, 1929, the date of the filing of the voluntary petition in bankruptcy herein, a merchant engaged in selling automobiles and automobile parts and accessories at 6054 Pacific Boulevard, Huntington Park, California.

III.

That your petitioner on December 31, 1929, was appointed Receiver in Bankruptcy herein, and immediately thereafter came into the possession of

1 Studebaker Big Six service car, California 1928, license No. 83241; Engine C. G. 19726; title No. 948647,

1 Ford roadster, 1928, license No. 190395; engine No. 10671293; title No. 874122, and

All furniture, show room equipment and shop equipment situated at 6054 Pacific Boulevard, Huntington Park, California, belonging to the bankrupt herein. [18]

IV.

That at all times since said December 31, 1929, the said property has been and now is in the possession of your petitioner as Receiver, subject to the payment of $900.00 per month for the safekeeping thereof, pending the election of a Trustee at a

first meeting of creditors, which is set for January 27, 1930.

V.

That on November 23, 1928, a chattel mortgage covering all of said above mentioned property was executed by Sassard & Kimbal, Inc., and acknowledged on November 30, 1928, affidavit of good faith executed on December 3, 1928, which was recorded December 19, 1928, and recorded in Book 7383, page 159, Official Records of Los Angeles County, State of California; that said chattel mortgage was executed to secure a note dated November 23, 1928, for $10,000.00, payable to Sylvan G. Bay, thirty days after date.

VI.

That at the time of the execution of said mortgage there were existing creditors of said mortgagor who have remained continuously and at all times since and up to December 31, 1929, creditors of said mortgagor, Sassard & Kimbal, Inc., Bankrupt.

VII.

That prior to the execution of said mortgage, no notice of the intended mortgage of stock in trade, fixtures and equipment belonging to said Sassard & Kimbal, Inc., merchants, was recorded in the office of the county recorder of Los Angeles County, California, in which county and state said property was situated, which notice was required by the provisions of Section 3440 of the Civil Code of the State of California.

VIII.

That said chattel mortgage so as aforesaid executed [19] by Sassard & Kimbal, Inc., is invalid and void as to the creditors of Sassard & Kimbal, Inc., Bankrupt, and the Trustee in Bankruptcy hereinafter to be elected, for the reason that said mortgage was not immediately recorded as required by the provisions of Section 2957, Civil Code of the State of California, and on the further ground that no notice of intention to mortgage was recorded as required by the provisions of Section 3440, Civil Code of the State of California, and also that said property is not sufficiently described in said chattel mortgage.

WHEREFORE, your petitioner prays that an order to show cause be issued directing the said Sylvan G. Bay to appear and show cause before the Referee herein, why an order should not be made and entered herein, determining, adjudging and decreeing said chattel mortgage as invalid and void as to the creditors of Sassard & Kimbal, Inc., and the Trustee in Bankruptcy hereinafter to be elected, and that your petitioner and the Trustee hereinafter to be elected, hold the within described property free and clear of any claim of right, title or interest therein by or on behalf of the said Sylvan G. Bay.

WM. H. MOORE, Jr.,
Receiver.

CRAIG & WELLER,
Attorneys for Receiver. [20]

United States of America,
Southern District of California,
Central Division,
County of Los Angeles,—ss.

Wm. H. Moore, Jr., being duly sworn says: That he is Receiver and petitioner in the foregoing entitled matter; that he has read the foregoing petition for order to show cause against Sylvan G. Bay and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

WM. H. MOORE, Jr.

Subscribed and sworn to before me this 15th day of January, A. D. 1930.

[Seal] BESS A. ALDRICH,
Notary Public in and for the County of Los Angeles, State of California.

Filed Jan. 15, 1930, at —— min. past 3 o'clock P. M. Rupert B. Turnbull, Referee. H. C. Archibald, Clerk. D.

[Indorsed]: Filed Jun. 24, 1930, 4 P. M. [21]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the verified petition of Wm. H. Moore, Jr., Receiver herein, and good cause appearing therefor,—

IT IS ORDERED, that Sylvan G. Bay be, and appear before the Honorable Rupert B. Turnbull, Referee in Bankruptcy, in the above-entitled matter, at the courtroom of Rupert B. Turnbull, 718 Security Building, Fifth and Spring Streets, Los Angeles, California, at the hour of 2:00 o'clock P. M., on the 21st day of January, 1930, and then and there show cause, if any he has, why an order should not be made decreeing the chattel mortgage executed by Sassard & Kimball, Inc., on or about November 23, 1928, in favor of the said Sylvan G. Bay, and recorded in Book 7383, page 159 of Official Records of Los Angeles County, State of California, to be void and of no force and effect as to the creditors of the said Sassard & Kimball, Inc., Bankrupt, and the Trustee in Bankruptcy hereafter to be elected. Copy of Receiver's petition shall be served with this order.

Dated: This 15th day of January, 1930.

RUPERT B. TURNBULL,
Referee. [22]

[Indorsed]: Filed Jun. 24, 1930, 4 P. M.. [23]

[Title of Court and Cause.]

ANSWER TO PETITION FOR ORDER TO SHOW CAUSE.

Comes now Sylvan G. Bay and answering the petition on file herein admits, denies and alleges as follows:

I.

Answering Paragraph III and IV on file herein the respondent has no information or belief on the subject sufficient to enable him to answer Paragraph III or IV of the petition on file and basing his denial on that ground, denies each and every and all allegations contained in said Paragraphs III and IV. Denies specifically that the sum of Nine Hundred ($900.00) Dollars per month or any other sum at all is necessary to be paid for the safekeeping of the property described in said petition.

II.

Answering Paragraph V denies that said chattel mortgage was executed on the 23d day of November, 1928, but alleges as a matter fact that said note and mortgage was executed on the 30th day of November, 1928, and that said affidavit of good faith was executed by Sassard & Kimbal, Inc., a corporation, on December 3d, 1928, and said affidavit was executed by Sylvan G. Bay, mortgagee herein on the 5th day of December, 1928. That thereafter said chattel mortgage was recorded in Book 7383, page 159 of Official Record, Los An-

geles County Records on December 19th, 1928. [24]

III.

Answering Paragraph VI, respondent has no information or belief upon the subject sufficient to enable him to answer and basing his denial on said ground, denies each and every allegation contained in said Paragraph VI.

IV.

That within a few days subsequent to the recordation of said note and chattel mortgage, Sylvan G. Bay assigned said instrument to Dr. O. S. Bay without recourse. That said Sylvan G. Bay had no interest in said indebtedness and/or in said instruments or the obligations secured thereby, except as a medium of transfer to Dr. O. S. Bay. That Dr. O. S. Bay is now the owner and holder of said note and chattel mortgage heretofore referred to.

V.

Denies that said chattel mortgage, as set forth in the petition, is invalid and/or void as to the creditors of Sassard & Kimbal, Inc., Bankrupt, and/or the trustee in bankruptcy hereinafter to be elected and/or any person, firm and/or corporation for the reason as set forth in said petition or for any other reason at all. Alleges as a matter of fact that said chattel mortgage and note heretofore referred to was at all times herein mentioned and now is valid and subsisting lien on the property against said bankrupt and his property. That said

claim is entitled to preference against any and all creditors of said bankrupt corporation.

VI.

Respondent alleges that William H. Moore, Jr., has no jurisdiction on property covered by said chattel mortgage, and alleges further that the above-entitled court has no jurisdiction over the said property covered by the chattel mortgage hereinbefore mentioned. [25]

WHEREFORE respondent prays that an order be made decreeing that the chattel mortgage and note referred to in the petition and answer be declared to be a valid and existing claim against the property of said bankrupt as recited in said chattel mortgage and *valid existing* as against all creditors of said bankrupt and/or trustee in bankruptcy hereinafter to be elected, that it be adjudged that any and all of said claims are subsequent to the claim as set forth in the said note and chattel mortgage, that it further be decreed that said receiver and/or trustee in bankruptcy and/or said bankrupt have no right, title or interest in and to said property, either for themselves and/or any of said creditors, but that Sylvan G. Bay have the right, title and possession of all said property covered by said chattel mortgage.

SYLVAN G. BAY.

State of California,
County of Los Angeles,—ss.

Sylvan G. Bay, being by me first duly sworn, deposes and says: That he is the respondent in the

above-entitled action; that he has read the foregoing answer to petition for order to show cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

SYLVAN G. BAY.

Subscribed and sworn to before me this 20 day of Jan., 1930.

[Seal] CHARLES F. REICNE,
Notary Public in and for the County of Los Angeles, State of California.

Filed Jan. 23, 1930, at —— min. past 10 o'clock A. M. Rupert B. Turnbull, Referee. H. C. Archibald, Clerk. B. [26]

[Indorsed]: Filed Jun. 24, 1930, 4 P. M.

Received copy of the within answer, etc., this 20th day of January, 1930.

CRAIG & WELLER—D.,
Attorneys for Wm. H. Moore, Jr., Receiver.
[27]

[Title of Court and Cause.]

STIPULATION AS TO FACTS ON APPEAL.

WHEREAS, the issue involved in the appeal in the above-entitled action arises only on a pure question of law; and

WHEREAS there is no dispute between the appellant and the appellee as to the facts involved in the controversy between the Trustee in Bankruptcy, as appellant and Dr. O. S. Bay, mortgagee, as appellee, and it being the desire of the parties hereto to simplify the record on appeal, now, therefore,—

IT IS STIPULATED AND AGREED by and between the appellant and appellee herein as follows:

I.

That at all times before the 23d day of November, 1928, and up to and including the 31st day of December, 1929, the date of the filing of the voluntary petition in bankruptcy herein, the bankrupt was a merchant engaged in selling automobiles, automobile parts and accessories at 6054 Pacific Boulevard, Huntington Park, California.

II.

That on the 31st day of December, 1929, a voluntary petition in bankruptcy was filed in the District Court of the United States for the Southern District of California, Central Division, by Sassard & Kimball, Inc., bankrupt herein, and that on the same day, to wit, December 31, 1929, Wm. H. Moore, [28] Jr., was appointed Receiver in Bankruptcy for the Estate of Sassard & Kimball, Inc., and upon his qualification as Receiver, took possession of the following described personal property:

1 Studebaker, Big Six service car, California 1928 license 83241, engine #C. G. 19726, title #948647.

1 Ford Roadster 1928 license 190395, engine #10671293, title number 874122, and

All furniture, showroom equipment and shop equipment situated at 6054 Pacific Boulevard, Huntington Park, California, belonging to the bankrupt, Sassard & Kimball, Inc.

III.

That at all times since December 31, 1929, all of the personal property hereinbefore described was in the possession of Wm. H. Moore, Jr., as Receiver in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, or in the possession of Wm. H. Moore, Jr., as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, the appellant herein.

IV.

That on November 23, 1928, a chattel mortgage covering all of the above mentioned property was executed by Sassard & Kimball, Inc., and acknowledged on November 30, 1928, with an affidavit of good faith executed on December 5, 1928, which said chattel mortgage was recorded in the office of the County Recorder of Los Angeles County, California, where said personal property was situated on December 19, 1928, recordation being in Book 7383, page 159 of official records of Los Angeles County, State of California; that said chattel mortgage was executed to secure a note dated November

23, 1928, for the sum of $10,000, payable to Sylvan G. Bay, due thirty days after date.

V. [29]

That thereafter within a few days subsequent to the recordation of said chattel mortgage, Sylvan G. Bay assigned said chattel mortgage and the promissory note secured by it, to the appellee herein, Dr. O. S. Bay, without recourse; that at the time of the filing of the petition for an order decreeing said chattel mortgage to be void in the bankruptcy court, the said Sylvan G. Bay claimed no right, title or interest therein, and that Dr. O. S. Bay is now the owner and holder of said note and chattel mortgage.

VI.

That at the time of the execution of said chattel mortgage there were existing creditors of the bankrupt who have remained creditors continuously and at all times since up to and including December 31, 1929.

VII.

That between the date of the execution of said chattel mortgage and the date of its recordation in the office of the county recorder of Los Angeles County, California, other persons, firms and corporations became creditors of the bankrupt, Sassard & Kimball, Inc., which said persons, firms and corporations have at all times since been creditors and now are creditors of the said bankrupt.

VIII.

That subsequently to the recordation of said

chattel mortgage other persons, firms and corporations became creditors of the bankrupt and at all times since have been and now are creditors of said bankrupt.

IX.

That prior to the execution of said chattel mortgage, no notice of intention to mortgage the stock in trade, fixtures and equipment belonging to the bankrupt Sassard & Kimball, Inc., was recorded in the office of the county recorder of [30] Los Angeles County, California, in which said county and state said property was situated, in accordance with the provisions of Section 3440 of the Civil Code of the State of California.

X.

That after the filing of the petition for an order to show cause why said chattel mortgage should not be decreed to be void against Sylvan G. Bay, Dr. O. S. Bay, the appellee herein, and the real party in interest, was substituted by agreement of the parties in place of Sylvan G. Bay, against whom the original order to show cause was filed.

Dated at Los Angeles, in the Southern District of California, this 23d day of June, 1930.

CRAIG & WELLER,
THOMAS S. TOBIN,
JAMES P. KELEHER,
Attorneys for Appellant.
SYLVAN G. BAY,
Attorney for Appellee.

[Indorsed]: Filed Jun. 24, 1930, 1:45 P. M.

[31]

[Title of Court and Cause.]

ORDER APPROVING STATEMENT OF FACTS AND SETTLING RECORD.

The Court having examined the statement of facts as stipulated to by counsel for the appellant and appellee, and having considered the same, now on motion of Thomas S. Tobin, one of the attorneys for the appellant herein,—

IT IS HEREBY ORDERED, that said statement of facts, as stipulated, be, and the same hereby is, in all respects approved.

Done at Los Angeles, in the Southern District of California, this 24 day of June, 1930.

WM. P. JAMES,
United States District Judge, Acting for Judge Killits, Who Heard This Matter and Who has Returned to Toledo, O.

[Indorsed]: Filed Jun. 24, 1930, 1:45 P. M. [32]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Southern District of California, Central Division:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an

appeal allowed in the above-entitled proceeding, and to include in such transcript the following:

1. Petition for order to show cause against G. Bay.
2. Order to show cause against Sylvan G. Bay.
3. Answer to petition for order to show cause.
4. Order decreeing chattel mortgage of Dr. O. S. Bay invalid and void as to the Trustee.
5. Petition for review of final order of Referee.
6. Referee's certificate on review.
7. Memorandum on petition for review. [33]
8. Order and decree of District Judge on review, dated April 24, 1930.
9. Stipulation as to facts on appeal.
10. Order settling record on appeal.
11. Praecipe.
12. Citation.

Dated at Los Angeles, California, May 10, 1930.

CRAIG & WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Solicitors for Appellant.

[Indorsed]: Filed Jun. 24, 1930. 1:45 P. M.

Service of the within praecipe admitted this 19th day of June, 1930.

SYLVAN G. BAY,
Solicitor for Appellee. [34]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing transcript, containing 34 typewritten pages, numbered from 1 to 34, inclusive, to be the transcript on appeal in the above-entitled matter, and contains a full, true and correct copy of petition for review of final order of referee, order declaring chattel mortgage of Dr. O. S. Bay invalid and void as to the Trustee, Referee's certificate on review, memorandum on petition to review, minute order, petition for order to show cause against Sylvan G. Bay, order to show cause, answer to petition for order to show cause, stipulation of facts on appeal, order approving statement of facts and settling record, and praecipe;

I DO FURTHER CERTIFY the fees of the Clerk for copying, comparing and certifying the foregoing record on appeal amount to $10.65, and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 10th day of July, in the year of our Lord

one thousand nine hundred and thirty, and of our Independence the one hundred and fifty-fifth.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California,

By Edmund L. Smith,
Deputy Clerk. [35]

[Endorsed]: No. 6147. United States Circuit Court of Appeals for the Ninth Circuit. Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Appellant; vs. O. S. Bay, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 14, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. ——.

In the Matter of SASSARD & KIMBALL, INC., Bankrupt,

and

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

PETITION FOR APPEAL.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The undersigned Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, conceiving himself aggrieved by the final order and decree of the District Court of the United States for the Southern District of California, Central Division, entered on April 24, 1930, granting the relief sought in the petition on review of the appellee herein, and decreeing the chattel mortgage held by the appellee to be valid as against creditors of the bankrupt whose claims against the bankrupt accrued subsequently to the date of the recordation of said chattel mortgage in the office of the county recorder of Los Angeles County, State

of California, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors herein filed, and he prays that said appeal be allowed and [36] that citation issue as provided by law, and that a transcript of the record, pleadings and documents upon which said order and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided.

Dated at Los Angeles, in the Southern District of California, this 30th day of April, 1930.

WM. H. MOORE, Jr.,
Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Appellant.

CRAIG & WELLER,
JAS. P. KELEHER,
THOMAS S. TOBIN,
Attorneys for Appellant. [37]

Service of the within petition for appeal is hereby admitted this 12th day of May, 1930.

SYLVAN G. BAY,
Attorney for Appellee.

[Endorsed]: Filed May 15, 1930. Paul P. O'Brien, Clerk. [38]

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. ——.

In the Matter of SASSARD & KIMBALL, INC., Bankrupt,

and

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

ASSIGNMENT OF ERRORS.

Comes now Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., and files the following assignment of errors on appeal from the order of the District Court of the United States for the Southern District of California, Central Division, dated April 24, 1930:

FIRST ASSIGNMENT OF ERROR.

That the United States District Court for the Southern District of California, Central Division, erred in failing to affirm the order of the Referee in Bankruptcy, Rupert B. Turnbull, Esquire, dated January 27, 1930, decreeing the chattel mortgage executed by the bankrupt in favor of Dr. O. S. Bay,

bearing date of November 23, 1923, invalid and void as to the appellant herein as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt. [39]

SECOND ASSIGNMENT OF ERROR.

That the United States District Court for the Southern District of California erred in modifying the order of the Referee described in the first assignment of error and declaring said chattel mortgage to be valid in so far as it affected creditors whose claims accrued subsequently to the recordation thereof.

THIRD ASSIGNMENT OF ERROR.

That the District Court of the United States for the Southern District of California, Central Division, erred in not decreeing said chattel mortgage described in the first assignment of error herein to be wholly null and void in so far as the Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, is concerned.

FOURTH ASSIGNMENT OF ERROR.

That the United States District Court for the Southern District of California, Central Division, erred in dividing the unsecured creditors of Sassard & Kimball, Inc., Bankrupt, into three different classes and granting priority of payment to creditors of the first and second classes of creditors over the third class.

WHEREFORE, the appellant prays that said order may be reversed and the cause remanded

with directions to enter an order decreeing the chattel mortgage described in the first assignment of error to be wholly null and void in so far as the Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, is concerned.

WM. H. MOORE, Jr.,
Trustee in Bankruptcy for the Estate of Sassard & Kimball, [40] Inc., Bankrupt, Appellant.
CRAIG & WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Attorneys for Appellant. [41]

Service of the within assignment of errors is hereby admitted this 12 day of May, 1930.

SYLVAN G. BAY,
Attorney for Appellee.

[Endorsed]: Filed May 15, 1930. Paul P. O'Brien, Clerk. [42]

At a stated term, to wit, the October term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-third day of May, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge: Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Court and Cause—No. 61,477.]

ORDER ALLOWING APPEAL.

Upon consideration of the petition for appeal and assignment of errors, filed May 15, 1930, by Messrs. Craig & Weller, Thomas S. Tobin and James P. Keleher counsel for appellant Wm. H. Moore, Jr., Trustee, etc., IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court for the Southern District of California, Central Division, entered on April 24, 1930, be, and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all other proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California. [43]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to O. S. Bay, Appellee Herein, and to Sylvan G. Bay, His Solicitor, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof,

pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Southern District of California, wherein Wm. H. Moore, Jr., as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, is appellant and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States Circuit Judge, for the Ninth Circuit, this 23d day of May, A. D. 1930.

FRANK H. RUDKIN,
United States Circuit Judge.

United States of America,—ss.

On this 19th day of June, in the year of our Lord one thousand nine hundred and thirty, personally appeared before me, Olive Diffenderfer, the subscriber, Georgene Bogle, and makes oath that she delivered a true copy of the within citation to Sylvan G. Bay.

GORGENE BOGLE.

Subscribed and sworn to before me at Los Angeles, this 19 day of June, A. D. 1930.

[Seal] OLIVE DIFFENDERFER,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Nov. 25, 1933.

[Endorsed]: Filed Jun. 27, 1930. Paul P. O'Brien, Clerk. [44]

No. 6147

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Thomas S. Tobin, counsel for the appellant, and submitted on behalf of appellee on affidavit of counsel for appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Saturday, the sixth day of December, in the year of our Lord one thousand nine hundred

and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in the above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before RUDKIN and WILBUR, Circuit Judges, and NORCROSS, District Judge.

NORCROSS, District Judge.—This is an appeal from an order made by the court below reversing a ruling of the Referee in Bankruptcy holding a certain chattel mortgage void as to all creditors.

The facts are stipulated and those material are as follows: At all times important to be considered in this case Sassard & Kimball, Inc., was a corporation engaged in the business of a merchant selling automobiles, automobile parts and accessories. On the 31st day of December, 1929, the corporation filed a voluntary petition in bankruptcy and on the same date appellant was appointed receiver for the estate of the bankrupt and, upon qualifying, took into his possession all property claimed to be a part of the estate, including that covered by a certain chattel mortgage in question. On November 23, 1928, the bankrupt executed a chattel mortgage as security for the payment of a certain promissory note for $10,000, payable thirty days after date to the assignor of appellee. The mortgage was acknowledged of date November 30, 1928, the affidavit of good faith was executed December 5, 1928, and the instrument filed for record and recorded by the County Recorder of Los Angeles county on December 19, 1928. The chattel mortgage covered a certain Studebaker service car, a Ford roadster, the furniture, show room and shop equipment of the bankrupt. Prior to the execution or filing of the mortgage no notice of intention to mortgage the stock in trade, fixtures and equipment belonging to the mortgagor was recorded in accordance with the provisions of section 3440 of the Civil Code of California. In relation to the mortgage, the proceeding presents three classes of creditors of the bankrupt: 1. Those existing at the date of the mortgage. 2. Those who became such between the date of the

mortgage and its recordation. 3. Those so becoming subsequent to the recording of the mortgage.

Section 3440 of the Civil Code of California provides that a chattel mortgage "will be conclusively presumed to be fraudulent and void as against the existing creditors * * * unless at least seven days before the consummation of such * * * mortgage the mortgagor * * * shall record in the office of the county recorder * * *. a notice of said intended * * * mortgage," setting out the particulars of its proposed effect and purpose.

It is clear that the mortgage, by reason of the provisions of the statute, is void as to creditors of the first class, and it is conceded it is also void as to those of the second class. As held by decisions of the Supreme Court of California, the mortgage would be valid as against creditors of the third class. (Ruggles vs. Cannedy, 127 Cal. 290; United Bank & Trust Co. vs. Powers, 89 Cal. App. 690.)

It is the contention of appellant that under section 70E of the Bankruptcy Act of 1898 the mortgage in question, being void as to one creditor or class of creditors is void *in toto* at the suit of the trustee.

Section 70E of the Bankruptcy Act reads:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.

> Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

There is no express language in this section which specifically gives to any unsecured creditor of a bankrupt any greater rights or any secured creditor any less right than he had before adjudication in bankruptcy. The rights of a trustee in bankruptcy to "avoid any transfer" are no greater than those of a creditor or particular class of creditors. It is clear, we think, that a trustee in bankruptcy is limited in his control and disposition of the estate of the bankrupt to the rights of creditors as such rights existed and could be enforced under the state law prior to the time proceedings in bankruptcy were instituted. This is not a case of an ordinary transfer of property in whole or in part in fraud of creditors, but a case of a transfer made void by statute only as to a specific class of creditors. In National Bank vs. Moore, 247 Fed. 913, this court said:

> "The trustee, in the interest of the general creditors, may therefore contest any claim of lien that a judgment creditor might contest if bankruptcy had not intervened."

In the case at bar only judgment creditors of the first or second class specified could have successfully

contested the mortgage had not bankruptcy intervened.

We quote with approval the following from the memorandum opinion of Judge Killits filed in the court below:

> "In 1910, the bankruptcy act was amended to make clear the position of the Trustee. It seems to have been the theory of the Referee that the effect of this amendment, which gave the Trustee the status of an execution creditor, so far affected the status of the creditors of each of the three classes, as against the mortgage, as to place them all on the same level of superiority. In this we are very clear that the Referee was wrong. There is nothing whatever in the cause for, or the language of the amendment of 1910 to produce such a result. The Trustee indeed represents all creditors, but only as their respective interests in the property under administration were fixed by local law when the bankruptcy proceedings intervened, and it is his duty to administer and distribute accordingly as he finds at that time liens or inferiorities of respective creditors were established. If at that time any creditors had no inchoate right under existing state laws to reduce his claim to judgment and thereby establish a lien by execution superior to an existing and recorded mortgage, he is bound in distribution to recognize the latter's superior position. It is said, as a settled law in federal courts, that there is so much of local nature

entering into chattel mortgages that federal courts accept as decisive the state law fixing the priority of such encumbrance. Etheridge vs. Sperry, 139 U. S. 266. See, also, In re Baxter and Co., 154 Fed. 22; and Union Bank of Chicago vs. Kansas City Bank, 136 U. S. 223."

In Peters vs. Bain, 133 U. S. 670, considering a statute relating to fraudulent conveyances somewhat similar to the statute here in question, the Supreme Court reiterated the views of that court that it would accept the conclusions of the highest court of the state as controlling.

It is contended in the brief of appellant that one of the cars covered by the mortgage was part of the bankrupt's stock in trade and hence was not subject to chattel mortgage under section 2955, California Civil Code. As this question does not appear to have been presented to or considered by the referee or court below, we express no opinion. If there is merit in the contention it may be presented in the further bankruptcy proceedings.

The order is affirmed.

[Endorsed]: Opinion. Filed Dec. 6, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6147.

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Dec. 6, 1930. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twelfth day of January, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellant, filed January 5, 1931, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from and including 1 to and including 55, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of February, A. D. 1931.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court

OF THE

United States

FILE COPY

OCTOBER TERM, 1930

No. [redacted] 27

In the Matter of
SASSARD & KIMBALL, INC.,
Bankrupt,
and
WM. H. MOORE, JR., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,
Appellant and Petitioner,
vs.
O. S. BAY,
Appellee and Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Petition for Review in Bankruptcy Taken by Said Petitioner Against O. S. Bay Lately Pending in Said Circuit Court of Appeals

and

BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

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WM. H. MOORE, JR., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,
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Comes now Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt by Charles F. Hutchins, Esq., its counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the

Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court for its review and determination, a certain cause in said Court of Appeals, lately pending, wherein the respondent O. S. Bay was appellee and your petitioner Wm. H. Moore, Jr., as Trustee in Bankruptcy for the estate of Sassard & Kimball, Inc., Bankrupt was appellant, and to that end it now tenders its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

CHARLES F. HUTCHINS,
Attorney for Petitioner.

FRANK C. WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Petition for Review in Bankruptcy Taken by Said Petitioner Against O. S. Bay Lately Pending in Said Circuit Court of Appeals.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Wm. H. Moore, Jr., as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, filed by virtue of the provisions of Section 25-D of the Bankruptcy Act of 1898 as amended by the Act of May 27, 1926, and Section 240 of the Judicial Code of the United States, respectfully represents as follows:

I.

That this cause involves a question of far reaching importance to mercantile and business interests and upon which the decisions of the Circuit Court of Appeals in the different Circuits are at variance, thus necessitating an authoritative determination thereupon by this Court.

II.

That the United States Circuit Court of Appeals for the Ninth Circuit has in this case construed Section 65-A of the Bankruptcy Act of 1898 in a manner which your petitioner believes to be untenable and in conflict with the weight of authority thereon and in conflict as well with an applicable decision of this Court.

III.

The questions involved are as follows:

a. When a trustee in bankruptcy, exercising the rights conferred upon him under and by virtue of Section 47-A, Subdivision 2, sets aside a transfer or mortgage of the bankrupt's property, void under

State law as to existing creditors at the time of the execution of the transfer or mortgage, under the provisions of Section 70-E of the Bankruptcy Act of 1898, does he set aside the transfer or mortgage in its entirety, rendering it wholly null and void, or does he set it aside only to the extent of the amount of creditors' claims existing at the time the void transfer was made or the void mortgage given?

b. When a trustee in bankruptcy avoids a transfer or a mortgage of the bankrupt's property, void under State law as to existing creditors, does he distribute the proceeds derived therefrom among all of the creditors of the bankrupt holding provable claims against his estate, or does he distribute the proceeds only to the class of creditors who could have avoided the transfer under State law had bankruptcy not intervened?

c. May the holder of a mortgage, declared by the laws of the State in which the property is situated, to be conclusively presumed to be fraudulent and void as to the bankrupt's existing creditors at the time of the execution of the mortgage, be paid in full out of the proceeds of the sale of the transferred property recovered, ahead of unsecured creditors of the bankrupt with provable claims, whose claims accrued subsequently to the execution and recordation of the void mortgage?

IV.

The proceedings in the Courts below, briefly stated, are as follows:

a. Sassard & Kimball, Inc., the bankrupt, was at all times before the 23rd day of November, 1928, and up to and including the 31st day of December, 1929, the date of the filing of the voluntary petition herein, a merchant engaged in selling automobiles, automobile parts and accessories at Huntington Park, California. On December 31, 1921, it filed a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of California, Central Division, and on the same day Wm. H. Moore, Jr., was appointed Receiver in Bankruptcy, took possession of the assets, including the property in litigation here, and was later elected Trustee in Bankruptcy for the bankrupt estate.

The property involved in this litigation consisted of all the furniture, show room equipment and shop equipment in the place of business of the bankrupt at Huntington Park, California, and two automobiles.

On November 23, 1928, a chattel mortgage covering all of the above mentioned property was executed by Sassard & Kimball, Inc., acknowledged on November 30, 1928, and an affidavit of good faith, as required by the laws of the State of California (Section 2957, Civil Code of California) was executed on December 5, 1928. The chattel mortgage was not recorded in the office of the County Recorder of Los Angeles County, California, where the property covered thereby was situated, until December 19, 1928. Said chattel mortgage was given to secure a promissory note dated November 23, 1928, for the sum of $10,000.00 payable to Sylvan G. Bay, due thirty days after date. A few days after the recordation of the chattel mortgage in

question, Sylvan G. Bay assigned the chattel mortgage and the promissory note secured by it, to the appellee, Dr. O. S. Bay without recourse.

At the time of the execution of the chattel mortgage in question, there were existing creditors of the bankrupt, Sassard & Kimball, Inc., who had remained creditors continuously and at all times since, up to, and including December 31, 1929, were creditors of the bankrupt herein, Sassard & Kimball, Inc.

Between the date of the execution of the chattel mortgage and the date of its recordation, other persons, firms and corporations became creditors of the bankrupt, Sassard & Kimball, Inc., which said persons, firms and corporations have at all times since been creditors, and now are, creditors of said bankrupt.

That subsequently to the recordation of the chattel mortgage, other persons, firms and corporations have become creditors of the bankrupt and at all times since have been, and now are, creditors of said bankrupt.

That prior to the execution of said chattel mortgage, no notice of intention to mortgage the fixtures and equipment belonging to the bankrupt Sassard & Kimball, Inc., was recorded in the office of the County Recorder of Los Angeles County, California, in which County and State said property was situated, in accordance with the provisions of Section 3440 of the Civil Code of the State of California.

The Trustee filed a petition before the Referee to set aside and avoid this chattel mortgage under Sec-

tion 3440 of the Civil Code of the State of California, Sections 70-E and 47-A of the Bankruptcy Act of 1898 and Amendments thereto, the order to show cause being directed against Sylvan G. Bay, the original owner and holder of the note and mortgage. At the hearing before the Referee, Dr. O. S. Bay, as the real party in interest, was substituted for Sylvan G. Bay. The foregoing facts were stipulated and the Referee decreed the mortgage to be wholly null and void as against the Trustee in Bankruptcy of Sassard & Kimball, Inc., and decreed its cancellation.

The order was filed on February 6, 1930. A review was taken to the District Judge by O. S. Bay and on April 24, 1930, Honorable John M. Killetts, District Judge pro tem., entered an order, together with a memorandum opinion, reversing the order of the Referee decreeing the mortgage to be wholly null and void, and directing that the chattel mortgage be set aside only to the extent of the claims of creditors existing at the time of the execution of the void mortgage and those whose claims came into existence between its execution and recordation. The opinion of Judge Killetts held the mortgage to be valid as to creditors whose claims came into existence subsequently to its recordation and required that the holder of the mortgage be paid in full before the creditors whose claims came into existence after the recordation of the mortgage.

An appeal from this order was allowed by the United States Circuit Court of Appeals for the Ninth Circuit under Section 24-B of the Bankruptcy Act

of the United States of 1898 and Amendments thereto, and upon appeal the United States Circuit Court of Appeals for the Ninth Circuit affirmed the decision of Judge Killetts decreeing the mortgage to be valid in so far as creditors of the third class were concerned, and requiring the Trustee to pay dividends of one hundred per centum to two classes of unsecured creditors of the bankrupt and distribute what was left, after the mortgage was paid, to creditors of the third class.

A petition for rehearing was filed by the Trustee in the United States Circuit Court of Appeals, which petition for rehearing was denied on January 12, 1931.

V.

Your petitioner believes that the judgments of the District Court of the United States for the Southern District of California and the United States Circuit Court of Appeals for the Ninth Circuit should be reversed for the reason that they erred in decreeing the chattel mortgage to be valid as to creditors whose claims came into existence after its recordation, even though bankruptcy had intervened and the Trustee had acquired the rights conferred upon him by Sections 47-A (2), 70-A (4), 70-A (5) and 70-E of the Bankruptcy Act of 1898 and Amendments thereto.

Your petitioner also believes that both lower Courts erred in directing the Trustee to pay dividends of a different per centum to unsecured creditors of the bankrupt whose claims are not expressly classified as debts which have priority under Section 64-B of the

Bankruptcy Act, which order your petitioner believes to be in direct conflict with the provisions of Section 65-A of the Bankruptcy Act of the United States.

Your petitioner also believes that said decisions of both lower Courts are in direct conflict with the decisions of this Court in *Globe Bank v. Martin*, 236 U. S. 288, in so far as the construction of Section 64-B of the Bankruptcy Act of 1898 and Amendments thereto is concerned, and is in direct conflict with the decisions of four Circuit Courts of Appeal in so far as their construction of Sections 67 and 70 of the Bankruptcy Act is concerned.

VI.

Your petitioner annexes hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings in said Circuit Court of Appeals in the case therein entitled, Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Bankrupt, Appellant, vs. O. S. Bay, Appellee, on petition of Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, for review, No. 6147, to the end that said case may be reviewed and determined by this Court as provided by law; and that the judgment of said Circuit Court

of Appeals in said case may be reversed by this Honorable Court.

And that said petitioner may have such other and further relief as may seem meet and proper.

And your petitioner will ever pray.

WM. H. MOORE, JR.,
Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Petitioner.

CHARLES F. HUTCHINS,
Attorney for Petitioner.

FRANK C. WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Of Counsel.

United States of America,
Southern District of California,
County of Los Angeles.—ss.

Wm. H. Moore, Jr., being duly sworn, says:

That he is the petitioner in the foregoing entitled matter; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

Wm. H. Moore, Jr.

Subscribed and sworn to before me this 16th day of February, 1931.

(Seal) Bess A. Aldrich,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 2, 1933.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

At the outset of this brief we wish to state that, for the Court's convenience, we are having the opinion of the Circuit Court of Appeals, herein complained of, set out as Appendix "A" at the back of this brief.

Section 1, subdivision 25, of the Bankruptcy Act of 1898 reads as follows:

> "'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

Section 70-A of the Bankruptcy Act of 1898, in so far as material here, reads as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Section 70-E of the Bankruptcy Act of the United States of 1898 reads as follows:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide

holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

Section 67-A of the Bankruptcy Act of 1898 reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 3440 of the Civil Code of the State of California, in so far as material here, reads as follows:

"* * * Provided, also, that the sale, transfer or assignment of stock in trade, in bulk, or a substantial part thereof otherwise, than in the ordinary course of trade, and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor or the intended vendee, transferee, assignee, or mortgagee, shall record, in the office of the county recorder in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale,

transfer, assignment, or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid."

Section 65-A of the Bankruptcy Act of the United States reads as follows:

"Dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured."

Section 64-B of the Bankruptcy Act of 1898 reads as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attor-

ney's fees, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the states or the United States is entitled to priority: Provided that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."

Section 47-A of the Bankruptcy Act, in so far as material here, reads as follows:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is the theory of the Trustee in this proceeding, and was likewise the theory of the Referee, and has, until the decision complained of, been regarded as the law in courts of bankruptcy in the State of California, that any transfer of personal property not accompanied by immediate delivery and actual and continued change of possession of the property, as required by Section 3440 of the Civil Code of California, was absolutely void as against a Trustee in bankruptcy, if at the time of the transfer there existed creditors holding provable claims against the estate of the bankrupt. It is true that if bankruptcy had not intervened, only creditors whose rights had been judicially determined, under State law, had a right to attack the transfer because of the provisions of Section 3441 of the Civil Code of the State of California, which required that a creditor's right must be judicially determined before the creditor could avoid the fraudulent act of the debtor.

However the Trustee in bankruptcy stood in a much more favorable category after the adjudication in bankruptcy, because under Section 47-A of the Bankruptcy Act he was placed in the status of an execution creditor with a judgment returned wholly unsatisfied and was further fortified by the provisions of Section 70-A of the Bankruptcy Act which conferred upon him by operation of law the title of the bankrupt to the fraudulently transferred property as of the date of the filing of the petition.

Everett v. Judson, 228 U. S. 474;
Robertson v. Howard, 229 U. S. 254;
Herritt v. Clark (C. C. A. 3rd Cir.), 247 Fed. 100

Prior to the enactment of the Codes of the State of California, in order to make a chattel mortgage valid as to existing creditors, it was necessary that there be an immediate delivery of the property followed by an actual and continued change of possession. The recording statutes of the State of California have done away with the requirement of actual delivery. (Section 2957, Civil Code of California.) The recordation, however, must be as promptly made as delivery would be required, were actual delivery made.

12 *Cal. Juris.*, 994;
Ruggles v. Kennedy, 127 Cal. 290;
Woods v. Bugbey, 29 Cal. 466;
Adlard v. Rogers, 105 Cal. 327;
Rohrbough v. Johnson, 107 Cal. 144;
Edwards v. Sonoma Valley Bank, 59 Cal. 136;
Watson v. Rogers, 53 Cal. 401.

If a chattel mortgage is not promptly recorded after its execution, any creditor who was such during any of the time it was withheld from record and while the property remained in the mortgagor's possession, has a right to levy an execution upon the property and sell it in the same manner as though there had been no attempted transfer or mortgage.

Rohrbough v. Johnson, 107 Cal. 144;
Edwards v. Sonoma Valley Bank, 59 Cal. 148.

The Court will note that the second class of creditors involved in this proceeding were creditors who became such during the period between the execution of the mortgage herein challenged and its recordation,

while the first class of creditors were in existence before its execution and through all of the intervening period down to bankruptcy.

It is our contention that the District Court and the Circuit Court of Appeals erred in restricting the Trustee's rights to set aside and avoid this mortgage only to the extent of the amount of creditors' claims in existence.

(1) Before its execution;

(2) Between the date of its execution and recordation, and placing the pretended lien of this void mortgage ahead of the claims of creditors who

(3) Sold merchandise to the bankrupt after the recordation of the mortgage.

In the first place the Circuit Court of Appeals has divested the Trustee of title to property, which, under Section 70-A, subdivisions 4 and 5 of the Bankruptcy Act of 1898, is expressly conferred upon him. At the date of the filing of the petition the hands of the bankrupt's creditors are stayed and he is powerless to transfer his property to anyone.

Everett v. Judson, 228 U. S. 474.

When a Trustee is elected and qualified, the law confers upon him title to all property transferred by the bankrupt in fraud of his creditors and all property which prior to the filing of the petition in bankruptcy the bankrupt might have transferred or which could have been levied upon and sold under judicial process against him.

But although the Trustee has title to such property, it is sometimes necessary, in order to avoid com-

plications, that his title be judicially determined by a Court of competent jurisdiction. In view of the fact that it was not always possible to find a creditor who had reduced his claim to judgment and had his rights judicially determined, and in view of the holding of this Court in

York Mfg. Co. v. Cassell, 201 U. S. 344

Congress in 1910 amended Section 47-A of the Bankruptcy Act to place the Trustee in the status of a judgment creditor with an execution returned wholly unsatisfied, instead of placing him in the shoes of the bankrupt as had been his prior status. This amendment gave rise to the doctrine that the Trustee in bankruptcy stands in the shoes of the most favored creditor in so far as unrecorded liens against and fraudulent transfers of the bankrupt's property are concerned.

There is no question but that under the laws of the State of California any of the creditors of the bankrupt holding provable claims against it, which claims had accrued either prior to the execution of the mortgage or between its execution and recordation, might have reduced their claims against it to judgment and levied an execution upon this property and sold it, on the ground that it constituted the fixtures of a merchant and had been mortgaged without the notice required under Section 3440 of the Civil Code of California, and that the mortgage thereon had not been promptly recorded.

Rohrbough v. Johnson, 107 Cal. 144.

Section 67-A of the Bankruptcy Act reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 67-B of the Bankruptcy Act reads as follows:

"Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor *for the benefit of the estate.*" (Italics ours.)

Therefore, it is our contention that inasmuch as any one of the creditors existing at the time of the delayed recordation of this chattel mortgage, might have levied an execution upon the property, sold it and caused a good title to be conveyed to it at execution sale, the Trustee with the power conferred upon him, as an artificial execution creditor under Section 47-A of the Bankruptcy Act, had the same rights to seize this property and sell it for the benefit of the estate, notwithstanding the void mortgage thereon.

Further, Section 70-E of the Bankruptcy Act gives the Trustee the right to avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and to recover the property so transferred, or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of adjudication. It is significant that Congress did not see fit to provide in this Section that the Trustee could set aside and

avoid transfers of the bankrupt's property only to the extent of the amount of claims of creditors affected by them. Congress, it will be noted, gave the Trustee blanket power to "avoid *any* transfer by the bankrupt of his property which *any* creditor of such bankrupt might have avoided" without any restrictions being placed upon this power. (Italics ours.)

The District Court and the Circuit Court of Appeals seem to have gone under the theory that under the laws of the State of California, creditors of the bankrupt could only have avoided this mortgage to the extent of the amount of creditors' claims existing at the time of the recordation of the mortgage. In this we respectfully submit both Courts were in error. The Supreme Court of California in *Noyes v. Bank of Italy*, 206 Cal. 266, seems to have held that a Trustee under Section 47-A, as an execution creditor may avoid a mortgage on a bankrupt's property if recordation thereof was delayed or was not properly acknowledged. In this case the Court said:

> "It is insisted, however, that it was not shown that any of the creditors of the bankrupt were in position to attack the mortgage in that it did not appear that any of them were creditors who had acquired a lien upon the mortgaged property by virtue of some legal proceeding or who had come armed with some process authorizing seizure of the property and that a mere creditor at large may not attack the mortgage. It is urged that the case of Loosemore v. Baker, 175 Cal. 420 (166 Pac. 26), citing Ruggles v. Cannedy, 127 Cal. 290, is directly in point and is controlling here. We think a sufficient answer to the contention lies in the

fact that whatever the status of the creditors may be in this case, the Bankruptcy Act has supplied the deficiency which the defendant claims to have existed and has vested the trustee in bankruptcy with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. Section 47 (a) 2 of the Bankruptcy Act, June 25, 1910 (Chap. 412, sec. 8, 36 Stats. at Large, 838, 840; Comp. Stats. 1913, Secs. 9586, 9631; U. S. Code (U. S. C. A.), title 11, sec. 75), provides: 'And such trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.'

"Interpreting said section 47 (a) 2 of the Bankruptcy Act the Supreme Court of the United States has held that the trustee acquired a lien status as of the time when the petition in bankruptcy was filed.' (Bailey v. Baker Ice Machine Co., 239 U. S. 268; 36 Sup. Ct. Rep. 50); (see also Martin v. Commercial National Bank, 245 U. S. 513; 38 Sup. Ct. Rep. 176, see also Rose's U. S. Notes) 4 Cal. Jur. pp. 59, 60, 62, 63, and cases cited)."

Further down the Court says:

"In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceedings, be entitled to attack the alleged void mortgage and to

enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc. I Collier on Bankruptcy, 12th ed., p. 728, et seq."

The Supreme Court of California also passes on the question as to the position of the trustee in stepping into the shoes of creditors whose claims came into existence between the date of the execution of the mortgage and its recordation. In that regard the Court says:

"The term *creditors* is general and applies to creditors existing prior to the mortgage, as well as subsequent." Citing *Cardenas v. Miller,* 108 Cal. 250.

The Supreme Court of California also discussed with approval the doctrine laid down by the United States District Court for the Southern District of California in the *Matter of Hazson,* 268 Fed. 904, in which the United States District Judge Bledsoe decreed a chattel mortgage withheld from recordation twenty-one (21) days after its acknowledgement to be null and void in so far as creditors were concerned. See also

Pierson v. Hickey, 16 S. D. 46;
Butler v. San Francisco Gas Co., 168 Cal. 32;
Bull v. Ford, 66 Cal. 176;
Oliver v. Bennamm, 292 Fed. 201.

CONFLICT OF APPELLATE COURTS.

Regarding the conflict of authorities on which this petition for writ of certiorari is based, we find that this question has been before five Circuit Courts of Appeal. The Fourth Circuit, the Fifth Circuit, the Sixth Circuit and the Eighth Circuit have held that when a trustee in bankruptcy sets aside a transfer of the bankrupt's property, void under state law, he avoids it in its entirety for the benefit of all of the creditors of the bankrupt. The Ninth Circuit, in the case at bar, has held to the contrary. The pioneer decision on this question in an appellate court was the *Matter of Kohler*, 159 Fed. 871, in which the United States Circuit Court of Appeals for the Sixth Circuit held that a transfer set aside under Section 67-A and 67-B, under an Ohio statute was set aside for the benefit of all creditors. The second decision was *Mullen v. Warner*, 11 Fed. (2nd) 62, in which the United States Circuit Court of Appeals for the Fourth Circuit held that a Trustee in avoiding a transfer of the bankrupt's property under Section 70-E of the Bankruptcy Act set it aside not for the benefit of antecedent creditors alone, but for the benefit of all of the creditors of the bankrupt. In this case the decision of the Circuit Court of Appeals for the Fifth Circuit in *American Trust Co. v. Duncan*, 254 Fed. 780, which held that the Trustee avoided the transfer for the benefit of creditors affected by it alone, and not for the benefit of all, was discussed at length. The Court criticised this opinion, and we note from the examination of later authorities that the Circuit Court of Appeals for the Fifth Circuit in

Campbell v. Dalbey, 32 Fed. (2nd) 229, subsequently receded from the position taken by it in *American Trust Co. v. Duncan*, supra. The third decision by a Circuit Court of Appeals is *Lytle v. Andrews*, 34 Fed. (2nd) 252, handed down by the United States Circuit Court of Appeals for the Eighth Circuit in 1929, in which the Circuit Court of Appeals said:

> "Although Lytle was not in name an officer of the corporation, he was nevertheless an active participant in a scheme to use the corporate assets to retire his own stock and in that way to defeat the rights of creditors. At least *one creditor*, the Sioux National Bank, exists whose claims are not satisfied. The trustee therefore has the right to set aside this transfer, and when it is set aside the recovery inures to the benefit of *all* creditors of the bankrupt estate." (Italics ours.)

The fourth decision of a Circuit Court of Appeals which conflicts with the opinion of the Court in the case at bar is *Campbell v. Dalbey*, 23 Fed. (2nd) 229, in which the Circuit Court of Appeals for the Fifth Circuit said:

> "As is stated in the former opinion in this case, the trustee, even though the right to preserve the lien under section 67f had been lost, had the right to avoid under section 70e any transfer by the bankrupt which any creditor might have avoided. The bank's suit was brought within one year from the giving of the mortgage, and was not prescribed by the state law (La. Revised Civil Code, art. 1987); and the judgment of the state court which set aside that mortgage in so far as it affected the bank is authorized by article

1977 of that code. It follows from section 70e that the trustee not only succeeded to the bank's right to avoid appellant's mortgage to the partial extent that it affected the bank, *but also was given the authority to avoid that mortgage fully and completely and recover the entire mortgaged property or its value, for the benefit of all the creditors of the bankrupt.* Stellwagen v. Clum, 245 U. S. 605; 41 A. B. R. 1, 38 S. Ct. 215, 62 L. Ed. 507." (Italics ours.)

See also:

Farmers Cooperative Company v. Barlow, 202 Fed. 1008, D. C. N. D.

The last named decision handed down by the Fifth Circuit is in our opinion a complete reversal of the stand taken by it many years ago in *American Trust and Savings Bank v. Duncan,* 254 Fed. 780.

The next question that arises is the question as to how a trustee can distribute the avails of an action to avoid a fraudulent transfer in unequal dividends to three different classes of creditors, paying the class of creditors affected by the void transfer or mortgage one hundred cents on the dollar first, then paying the holder of the void mortgage the amount claimed by him under it and leaving the subsequent creditors to take what is left, if there is anything.

This Court has passed squarely on the question of whether or not the creditor who would have had a right to avoid a transfer had bankruptcy not intervened, was entitled to preferential treatment at the hands of the Trustee in the distribution of the avails of a recovery where a void transfer was set aside.

The decision we refer to is *Globe Bank v. Martin*, 236 U. S. 288, in which this Court held that a creditor who might have avoided the transfer of the bankrupt's property, had not bankruptcy intervened, was not a holder of "debts owing to any person who by the laws of the state or United States is entitled to priority." In that case this Court said:

> "It is contended, however, by the appellants, that if we assume that under section 67f of the Bankruptcy Act, the property or its proceeds must come to the trustee, to be distributed by him under the orders of the bankruptcy court for the benefit of the estate, that inasmuch as, under the statute of Kentucky, creditors existing prior to the making of the deal in question were entitled to be preferred in the distribution of the proceeds, that right is protected by sub-section 5 of section 64b of the Bankruptcy Act, which provides that the debts to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others,
> 'debts owing to any person who, by the laws of the states or the United States, is entitled to priority':
> and it is contended that this sub-section as considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion written by the late Justice Lurton (Re Bennett, 18 A. B. R. 320, 152 Fed. 673), maintains that position. But an examination of that case shows that it dealt with a statutory lien created under section 487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplies to manufacturing companies, and creating a lien upon the property in cases of such companies in case of an assignment for the benefit of creditors, or where

the property is distributed among creditors by operation of law or by act of the company. It was held that such statutory lien gave a substantial right in or inchoate lien upon the property from the date of furnishng the material, within the spirit and meaning of section 64b, subsection 5, of the Bankruptcy Act. That case, and such cases as Re Laird (C. C. A., 6th Cir.), 6 A. B. R. 1, 109 Fed. 550, which dealt with labor claims, recognize the purpose of Congress in passing section 64b, to maintain statutory liens and preferences in such cases in the distribution of the bankrupt estate."

If creditors existing at the time of the void transfer complained of are not such creditors as are included in Section 64-B, subdivision 7, they cannot possibly have a preferred standing under any of the provisions of the Bankruptcy Act. Section 64-B expressly sets out all of the claims of creditors having priority in the distribution of funds of a bankrupt estate, including only the following:

(1) Expenses of preserving the assets subsequent to the filing of the petition,

(2) Filing fees paid by creditors in involuntary cases and where property of the bankrupt is transferred or concealed by him either before or after the filing of the petition, which have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such,

(3) Costs of administration and attorney fees,

(4) Expense of successfully resisting a composition, incurred by one or more creditors,

(5) Wages due workmen, servants, clerks, etc.,

(6) Taxes.

On the contrary, section 65-A expressly requires that:

"Dividends of an equal percentum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Therefore in view of the fact that a conflict exists on a question as important as this, with four Circuit Courts of Appeal holding one way and one Circuit holding another, we respectfully submit our petition for a writ of certiorari to this Court. That the question is of vital importance in the mercantile world cannot be questioned. If a transfer, which the statute of a State denounces as conclusively presumed to be fraudulent and void as to existing creditors, may only be set aside by the Trustee to the extent of the amount of creditors' claims affected by it, we earnestly contend that a dangerous situation exists which can be cured only by a new amendment to Section 70-E of the Bankruptcy Act, unless this Court interferes and reverses the holding of the Circuit Court of Appeals for the Ninth Circuit. Under this rule it would be possible for a bankrupt to transfer a hundred thousand dollars' worth of property at a time when he only owed $5,000 and later incur indebtedness many times the value of the property. The Trustee would be powerless to avoid it beyond the sum of $5,000, even though the holder of the property might be an actual fraudulent grantee. Although the Circuit Court of Appeals for the Ninth Circuit did not ex-

pressly say that it would hold the same thing in a case where actual fraud was proven, the principle laid down is nevertheless dangerous to say the least. In many cases, personal property is transferred without change of possession and fictitious indebtedness of many years back is conjured up by the bankrupt and his fraudulent transferee for the purpose of bolstering up the transfer. It was to avoid the debtor's attempts to have his cake and eat it that Section 3440 of the Civil Code of California was passed. That Section forbids a debtor to transfer his personal property to anyone and at the same time use and enjoy it. It makes such a transfer or mortgage absolutely void as to his creditors while he remains in possession, and either prior or subsequent creditors may attack such a void transfer or mortgage, if they see fit. *Noyes v. Bank of Italy*, 206 Cal. 266.

Under the dissenting construction of Section 65-A by the Circuit Court of Appeals for the Ninth Circuit, the Bankruptcy Act will be robbed of its uniformity in a substantive chapter thereof. Creditors of bankrupts guilty of fraudulent transfers having their domiciles in the Fourth, Fifth, Sixth and Eighth Circuits will be entitled to dividends based on 100% of the value of the Trustee's recovery of the fraudulently transferred property and all creditors of the bankrupt will be treated alike in the distribution. The creditors of bankrupts who have their domicile in the Ninth Circuit will be compelled to take the leavings, after all creditors whose claims existed at the time of the transfer have been paid one hundred cents on the dollar and the fraudulent transferee, or mort-

gagee, fully taken care of. We believe that this construction placed upon Section 65-A of the Bankruptcy Act by the Ninth Circuit Court of Appeals is wholly out of harmony with both the letter and spirit of uniformity so characteristic of the Bankruptcy Act.

It is our understanding that this Court does not want an exhaustive brief in connection with a petition for a writ of certiorari, therefore this brief is not as comprehensive or detailed as the brief that we shall file in support of our contention, should our petition for a writ of certiorari be granted.

Respectfully submitted,

CHARLES F. HUTCHINS,
Attorney for Petitioner.

FRANK C. WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

In the Matter of
SASSARD & KIMBALL, INC.,
Bankrupt,

and

WM. H. MOORE, JR., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,
Appellant and Petitioner,

vs.

O. S. BAY,
Appellee and Respondent.

CERTIFICATE OF COUNSEL.

I, the undersigned, a member of the Bar of the Supreme Court of the United States hereby certify that the foregoing petition for a writ of certiorari in the above entitled matter is in my opinion well

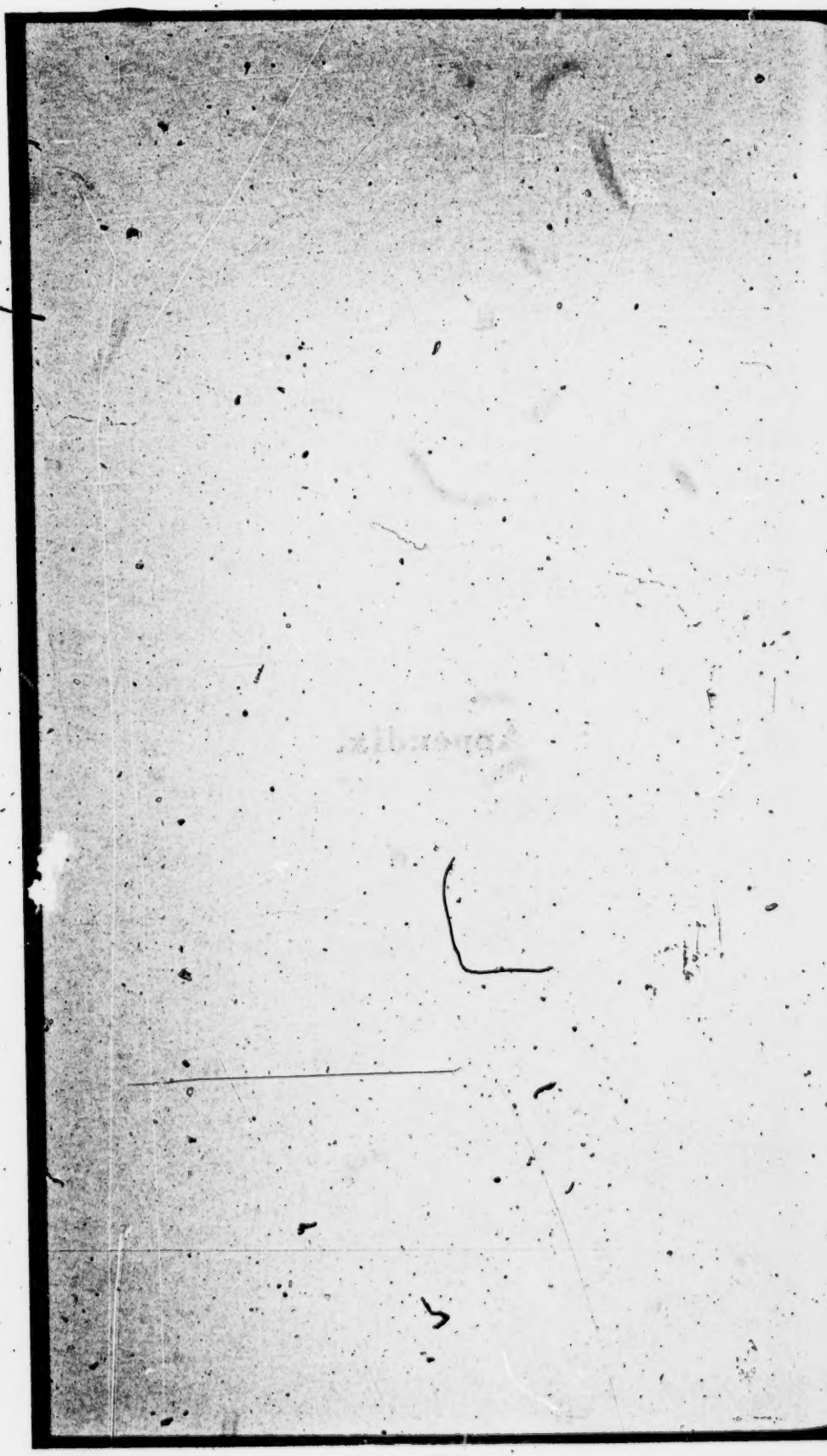
founded and meritorious, and that said petition is not interposed for the purpose of hindering or delaying the appellee herein.

Dated at Los Angeles, in the Southern District of California, this 31st day of January, 1931.

CHARLES F. HUTCHINS,
Attorney for Appellant.

(Appendix Follows.)

Appendix.



Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6147

Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,

Appellant,

vs.

O. S. Bay,

Appellee.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before Rudkin and Wilbur, Circuit Judges, and Norcross, District Judge.

Opinion

Norcross, District Judge:

This is an appeal from an order made by the court below reversing a ruling of the Referee in Bankruptcy holding a certain chattel mortgage void as to all creditors.

The facts are stipulated and those material are as follows: At all times important to be considered in

this case Sassard & Kimball, Inc., was a corporation engaged in the business of a merchant selling automobiles, automobile parts and accessories. On the 31st day of December, 1929, the corporation filed a voluntary petition in bankruptcy and on the same date appellant was appointed receiver for the estate of the bankrupt and, upon qualifying, took into his possession all property claimed to be a part of the estate, including that covered by a certain chattel mortgage in question. On November 23, 1928, the bankrupt executed a chattel mortgage as security for the payment of a certain promissory note for $10,000, payable thirty days after date to the assignor of appellee. The mortgage was acknowledged of date November 30, 1928, the affidavit of good faith was executed December 5, 1928, and the instrument filed for record and recorded by the County Recorder of Los Angeles county on December 19, 1928. The chattel mortgage covered a certain Studebaker service car, a Ford roadster, the furniture, show room and shop equipment of the bankrupt. Prior to the execution or filing of the mortgage no notice of intention to mortgage the stock in trade, fixtures and equipment belonging to the mortgagor was recorded in accordance with the provisions of section 3440 of the Civil Code of California. In relation to the mortgage, the proceeding presents three classes of creditors of the bankrupt: 1. Those existing at the date of the mortgage. 2. Those who became such between the date of the mortgage and its recordation. 3. Those so becoming subsequent to the recording of the mortgage.

Section 3440 of the Civil Code of California provides that a chattel mortgage "will be conclusively presumed to be fraudulent and void as against the existing creditors * * * unless at least seven days before the consummation of such * * * mortgage the mortgagor * * * shall record in the office of the county recorder * * * a notice of said intended * * * mortgage," setting out the particulars of its proposed effect and purpose.

It is clear that the motgage, by reason of the provisions of the statute, is void as to creditors of the first class, and it is conceded it is also void as to those of the second class. As held by decisions of the Supreme Court of California, the mortgage would be valid as against creditors of the third class. (*Ruggles v. Cannedy*, 127 Cal. 290; *United Bank and Trust Co. v. Powers*, 89 Cal. App. 690.)

It is the contention of appellant that under section 70E of he Bankruptcy Act of 1898 the mortgage in question, being void as to one creditor or class of creditors, is void in toto at the suit of the trustee.

Section 70E of the Bankruptcy Act reads:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such

recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

There is no express language in this section which specifically gives to any unsecured creditor of a bankrupt any greater rights or any secured creditor any less right than he had before adjudication in bankruptcy. The rights of a trustee in bankruptcy to "avoid any transfer" are no greater than those of a creditor or particular class of creditors. It is clear, we think, that a trustee in bankruptcy is limited in his control and disposition of the estate of the bankrupt to the rights of creditors as such rights existed and could be enforced under the state law prior to the time proceedings in bankruptcy were instituted. This is not a case of an ordinary transfer of property in whole or in part in fraud of creditors, but a case of a transfer made void by statute only as to a specific class of creditors. In *National Bank v. Moore*, 247 Fed. 913, this court said:

"The trustee, in the interest of the general creditors, may therefore contest any claim of lien that a judgment creditor might contest if bankruptcy had not intervened."

In the case at bar only judgment creditors of the first or second class specified could have successfully contested the mortgage had not bankruptcy intervened.

We quote with approval the following from the memorandum opinion of Judge Killits filed in the court below:

"In 1910, the bankruptcy act was amended to make clear the position of the Trustee. It seems to have been the theory of the Referee that the effect of this amendment, which gave the Trustee the status of an execution creditor, so far affected the status of the creditors of each of the three classes, as against the mortgage, as to place them all on the same level of superiority. In this we are very clear that the Referee was wrong. There is nothing whatever in the cause for, or the language of the amendment of 1910 to produce such a result. The Trustee indeed represents all creditors, but only as their respective interests in the property under administration were fixed by local law when the bankruptcy proceedings intervened, and it is his duty to administer and distribute accordingly as he finds at that time liens or inferiorities of respective creditors were established. If at that time any creditors had no inchoate right under existing state laws to reduce his claim to judgment and thereby establish a lien by execution superior to an existing and recorded mortgage, he is bound in distribution to recognize the latter's superior position. It is said, as a settled law in federal courts, that there is so much of local nature entering into chattel mortgages that federal courts accept as decisive the state law fixing the priority of such encumbrance. *Etheridge v. Sperry*, 139 U. S. 266. See, also, *In re Baxter and Co.*, 154 Fed. 22; and *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223."

In *Peters v. Bain*, 133 U. S. 670, considering a statute relating to fraudulent conveyances somewhat similar to the statute here in question, the Supreme

Court reiterated the views of that court that it would accept the conclusions of the highest court of the state as controlling.

It is contended in the brief of appellant that one of the cars covered by the mortgage was part of the bankrupt's stock in trade and hence was not subject to chattel mortgage under section 2955, California Civil Code. As this question does not appear to have been presented to or considered by the referee or court below, we express no opinion. If there is merit in the contention it may be presented in the further bankruptcy proceedings.

The order is affirmed.

Filed Dec. 6, 1930.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

In the Matter of SASSARD & KIMBALL, INC., Bankrupt, and WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,

Appellant and Petitioner.

vs.

O. S. BAY,

Appellee and Respondent.

Appellant's Brief Filed Under Writ of Certiorari Hereinbefore Issued to the United States Circuit Court of Appeals for the Ninth Circuit

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Statement

Sassard & Kimball, Inc., the bankrupt in the proceeding at bar, was at all times before November 23, 1928, and up to and including December 31, 1929, the date of filing of the voluntary petition herein, a merchant engaged in selling automobiles, automobile parts and accessories at Huntington Park, California. The voluntary petition in this proceeding was filed in the United States District

Court for the Southern District of California, on December 31, 1929. On the same day that the petition was filed, Wm. H. Moore, Jr., of Los Angeles, California, was appointed Receiver in Bankruptcy and took possession of the assets of the bankrupt, including the property in litigation here. At the first meeting of creditors thereafter held, Mr. Moore was elected Trustee in Bankruptcy for the estate of the bankrupt.

The property involved in this litigation consists of all the furniture, show room equipment and shop equipment in the place of business of the bankrupt at Huntington Park, California, and two automobiles.

On November 23, 1928, the bankrupt executed and delivered to Sylvan G. Bay a promissory note, bearing even date, for the sum of $10,000.00, payable to the said Sylvan G. Bay, and due thirty days after date. On the same date, November 23, 1928, the bankrupt executed a chattel mortgage, covering all of the furniture, show room equipment and shop equipment in its place of business and two automobiles in favor of Sylvan G. Bay for the purpose of securing payment of the promissory note of $10,000.00, described in the preceding paragraph. The chattel mortgage was acknowledged seven days later on November 30, 1928, and thereafter on December 5, 1928, the affidavit of good faith required by Section 2957 of the Civil Code of California was signed by the mortgagor. This chattel mortgage was then withheld from record for fourteen more days after the execution of the affidavit of good faith required by the California statute, being recorded in the office of the County Recorder of Los Angeles County, California, where the mortgaged property was situated, on December 19, 1928.

Shortly after the recordation of the chattel mortgage, Sylvan G. Bay, the original mortgagee, executed an assignment of it, together with the promissory note secured by it, to the appellee herein, Dr. O. S. Bay, without recourse.

At the time that the chattel mortgage was executed by the bankrupt, it was indebted to a number of existing creditors. These creditors remained creditors of the bankrupt continuously up to and including December 31, 1929, the time of the filing of the petition in bankruptcy, and are creditors of the bankrupt in the bankruptcy proceedings of Sassard & Kimball, Inc.

Between the date of the execution of the chattel mortgage on November 23, 1928, and the date of its recordation on December 19, 1928, another group of creditors sold merchandise to the bankrupt and remained creditors continuously up to and including the time of the filing of the petition in bankruptcy and are now creditors of the bankrupt in the bankruptcy proceedings.

Subsequent to the recordation of the chattel mortgage a third group of creditors came into existence and sold merchandise to the bankrupt on credit and are now creditors of the bankrupt.

When the chattel mortgage in question was executed on November 23, 1928, no notice of intention to mortgage the fixtures and equipment belonging to the bankrupt, Sassard & Kimball, Inc., bankrupt, was recorded in the office of the County Recorder of Los Angeles County, California, where the property was situated. This notice of intention to mortgage is mandatory under the provisions of Section 3440 of the Civil Code of the State of California, and any mortgages covering fixtures

of a merchant or garage owner, given without the recordation of notice of intention to mortgage, are declared by Section 3440 to be conclusively presumed to be fraudulent and void as against existing creditors of the mortgagor.

The Trustee filed a petition before the Referee in Bankruptcy, Rupert B. Turnbull, Esquire, seeking to set aside and avoid this chattel mortgage on the ground that no notice of intention to mortgage had been recorded, and that the mortgage had been withheld from recordation an unreasonable length of time to the detriment of creditors of the bankrupt and in violation of Section 3440, Civil Code of California. The order to show cause issued by the Referee was directed to Sylvan G. Bay, the original mortgagee, as the Trustee had no notice of the assignment of the mortgage. When the matter was reached for trial before the Referee and the true facts became known with regard to the assignment of the mortgage, Dr. O. S. Bay, the real party in interest, was substituted. The facts hereinbefore set forth were stipulated to, and the Referee promptly decreed the chattel mortgage in question to be wholly null and void as against the Trustee in Bankruptcy, and ordered its cancellation.

This order cancelling the mortgage was filed on February 6, 1930. The mortgagee took a review of the Referee's order and on April 24, 1930, Honorable John M. Killets, a District Judge from Ohio, sitting in the Southern District of California under a pro tem assignment, entered an order, together with a memorandum opinion, reversing the order of the Referee and decreeing the chattel mortgage to be valid as to the third class of creditors, whose claims came into existence after its

recordation, but void as to those creditors whose claims were in existence at the time of the execution of the mortgage and whose claims came into existence between the date of its execution and recordation. The result of the reversal was to require the Trustee to pay creditors whose claims were in existence prior to the execution of the mortgage (hereinafter referred to as creditors of the first class) and creditors whose claims came into existence between the date of its execution and recordation (hereinafter referred to as creditors of the scond class) 100 cents on the dollar of the amount of their claims, then to pay Dr. O. S. Bay the $10,000.00 called for under his mortgage, and if anything were left after this admittedly void mortgage was paid, to distribute the leavings to the unfortunate creditors of the third class whose claims came into existence after the recordation of the mortgage.

The Trustee took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under Section 24-B of the Bankruptcy Act of 1898, which appeal was allowed, and was argued in October, 1930. On December 6, 1930, the Circuit Court of Appeals handed down a decision affirming the decision of the Judge of the District Court. A petition for rehearing was denied and the Trustee thereupon applied to this Court for a writ of certiorari, which was granted.

ARGUMENT

Points and Authorities

It is the contention of the Trustee and appellant here that both the District Court and the United States Circuit Court of Appeals erred in decreeing that a chattel mort-

gage which was void as to two classes of creditors out of three could not be avoided *in toto*, by the Trustee, for the benefit of all of the creditors of the bankrupt, and that the Court erred further in making two classes of general creditors preferred creditors in the distribution of the bankrupt's assets, to the detriment of a third class of general creditors. We believe that the doctrine laid down by the two lower Courts is in direct violation of Section 65-A of the Bankruptcy Act and is contrary to the opinion of this Court construing Section 65-A in *Globe Bank v. Martin*, 236 U. S. 288, and further that it is in direct conflict with decisions of four Circuit Courts of Appeal in eastern Circuits which have passed upon this same question.

Statutory Provisions

Section 3440 (Division 4, Part 2, Title 2), *Civil Code of the State of California*, as it existed at the time of the mortgage complained of, reads as follows, in so far as material here:

> "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his

estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer * * *. Provided, also, * * * that the sale, transfer, assignment or mortgage of the fixtures or store equipment of a * * * garage owner * * * or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor or the intended vendee, transferee, assignee, or mortgagee, shall record in the office of the county recorder in the county or counties in which said * * * fixtures or equipment are situated a notice of said intended sale, transfer, assignment or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid."

Section 2957 of the *Civil Code of the State of California* (Division 3, Part 4, Title 14, Chapter 2, Article 3) reads as follows:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless:

"1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and

without any design to hinder, delay, or defraud creditors;

"2. It is acknowledged or proved, certified, and recorded in like manner as grants of real property."

Section I, subdivision 25, of the *Bankruptcy Act of 1898* reads as follows:

> " 'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

Section 70-A of the *Bankruptcy Act of 1898,* in so far as material here, reads as follows:

> "The Trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Section 70-E of the ***Bankruptcy Act of the United States of 1898*** **reads as follows:**

> "The Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the

property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

Section 67-A of the *Bankruptcy Act of 1898* reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 67-B of the *Bankruptcy Act of 1898* reads as follows:

"Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor *for the benefit of the estate.*" (Italics ours.)

Section 65-A of the *Bankruptcy Act of the United States* reads as follows:

"Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Section 64-B of the *Bankruptcy Act of 1898* reads as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fees, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the states or the United States is entitled to priority: Pro-

> vided that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."

Section 47-A-2 of the *Bankruptcy Act*, in so far as material here, reads as follows:

> "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is our contention that under Section 3440 of the Civil Code of the State of California this mortgage was wholly void as to the Trustee in Bankruptcy, even without the assistance of Sections 70-A and 47-A of the Bankruptcy Act of the United States. The Court will note that Section 3440 makes a transfer of personal property, without immediate delivery and actual and continued change of possession of the property involved, fraudulent and void as against those who are his creditors while he remains in possession *and the successors in interest of such creditors and against any person on whom his estate devolves in trust for the benefit of others than himself.* (Italics ours.)

The Trustee in Bankruptcy, being a "person on whom the estate of the debtor devolves in trust for the benefit of others," is thus placed in the class of persons who could avoid a transfer or mortgage of personal property given without prompt recordation or immediate

change of possession under the provisions of this code section.

Francisco v. Aguirre, 94 Cal. 180.

Prior to the adoption of the recording statutes of the State of California, it was necessary to the validity of a chattel mortgage that the property mortgaged be immediately delivered to the mortgagee under Section 3440 of the Civil Code. Possession of the mortgaged chattels was retained by the mortgagee until the mortgage had been satisfied or paid, otherwise the mortgage was void as to creditors of the mortgagor while he remained in possession.

Chenery v. Palmer, 6 Cal. 119;
Ruggles v. Cannedy, 127 Cal. 290;
Hopper v. Keyes, 152 Cal. 488.

Thereafter the Legislature of California passed the recording statutes, providing for the recordation of chattel mortgages in the county in which the mortgaged property is situated and the courts of California have held that the recordation required by Section 2957 of the *Civil Code of California* must be made as promptly as the required delivery under Section 3440, prior to the enactment of the recording statutes.

"The law may be said to contemplate or require immediate recordation because the rights of creditors arising before recordation are superior to those of the mortgagee, or it may be said that, while the law does not exact immediate recordation, it renders the mortgage void as to such creditors until it be so recorded."

Ruggles v. Cannedy, 122 Cal. 290.

At another place in the same decision (*Ruggles v. Cannedy,* supra) the Court says:

> "We conclude upon this question that our law requires immediate recordation in lieu of immediate delivery, and that when such recordation is not effected, the mortgage is void *as against creditors of the mortgagor*. The penalty for a failure to record promptly in a case of a mortgage is identical with the penalty under Section 3440 for a failure to deliver promptly in the case of a sale. In either case, the failure results in a legal fraud against those whom the statute enumerates and protects." (Italics ours.)

We therefore conclude from the foregoing decisions of the Supreme Court of California that any person on whom the estate of the debtor devolved in trust for the benefit of others could have avoided this mortgage under Section 3440, if for no other reason than the fact that recordation thereof was not had immediately.

As far back as 1883, the Supreme Court of California has held that an assignee in insolvency of a vendor was a successor in interest of the vendor's creditors and was also one on whom his estate devolved in trust for the benefit of others than himself and as such had a right to avoid a mortgage or transfer of personal property made without immediate delivery and actual and continued change of possession.

In *Merrill v. Hurlburt,* 63 Cal. 494, the Supreme Court of California, after quoting Section 3440 of the Civil Code of California, says:

> "The assignee in insolvency of the vendor was a successor in interest of his creditors and was one

'on whom his estate devolved in trust for the benefit of others than himself.'"

This doctrine has been followed by the Supreme Court of California in the following subsequent decisions:

Brown v. Bank of Napa, 77 Cal. 546;
Francisco v. Aguirre, 94 Cal. 180;
Ruggles v. Cannedy, 127 Cal. 290-304.

In *Brown v. Bank of Napa,* 77 Cal. 544-46, the Supreme Court of California says:

"We think that the assignee in insolvency is a person on whom the estate of an insolvent devolves in trust for the benefit of others. Such estate devolves upon the assignee by operation of law under the statutes in relation to insolvents in this state (see article 4 of the Insolvent Act, section 17) for the benefit of others, viz., the creditors of the insolvent. Of the correctness of this position, we do not entertain a doubt.

"It was so held in Merrill v. Hurlburt, 63 Cal. 496, by Department One of this court, and we concur in and approve the ruling. It was also held in the case just cited that the assignee was the successor in interest of the creditors. There certainly is much reason for so holding. The creditors cannot sue to recover their debts. The assignee has the right to sue for and recover everything due to the estate for the benefit of the creditors.

"We adhere to this ruling, also, in the case cited."

In *Francisco v. Aguirre,* 94 Cal. 180, the Supreme Court of California, at page 185, says:

"An estate is said to 'devolve' upon another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to

another; but it does not devolve *from* one person to another as the result of some positive act or agreement between them. The word is itself of intransitive significance, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Instances of its appropriate use are found when speaking of the succession of estates upon death, or upon a change of official incumbents; also in proceedings in bankruptcy or insolvency, where, by the act or operation of law, the estate of the bankrupt devolves upon his assignee."

Trustee's Rights Under Sections 47-A and 70-E

We now come to a consideration of the rights of a Trusteee in Bankruptcy under the Bankruptcy Act itself. In the first place Section 70-A of the Bankruptcy Act confers upon the Trustee in Bankruptcy, as of the date of adjudication, the title of the bankrupt to all property transferred by him in fraud of his creditors, and property, which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.

Bankruptcy Act, Section 70-A, Sudivisions 4 and 5;
In re Kohler, 159 Fed. 871.

Under Subdivision E of Section 70, the Trustee is given the right to avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided and to recover the property so transferred, or its value, from the person who received it.

Globe Bank v. Martin, 236 U. S. 288;
Security Warehousing Co. v. Hand, 206 U. S. 415.

Now what right has a Trustee in Bankruptcy to the property in question here? A "transfer" of property as defined in Section I, Subdivision 25, includes a mortgage of property. Therefore the Trustee, under Section 70-E, had a right to avoid the mortgage on this property, if any creditor of the bankrupt could have avoided it. This right is not peculiar to the Bankruptcy Act alone, nor is it a right peculiar alone to Trustees in Bankruptcy. As we have seen from the cases cited in the preceding paragraphs, an assignee in insolvency under California law would have had the same rights to avoid a mortgage or transfer that a Trustee in Bankruptcy has, and both of them are possessed of the rights conferred by Section 3440 of the Civil Code of California on the most favored creditor of the insolvent. What are the rights of the most favored creditor?

In *Butler v. San Francisco Gas & Electric Company*, 168 Cal. 32, the Court says, at page 39:

> "A void thing is as no thing. So far as existing creditors are concerned, the title and ownership of the property remained in the fraudulent grantor as fully as though no transfer had been attempted. In 1 Freeman on Executions, section 136, it is said; 'As against the fraudulent transferee the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale (on execution) is not a mere equity—not the right to control the legal title and to have the fraudulent transfer vacated by some appropriate proceeding; *it is the legal title itself, against which the fraudulent transfer is no transfer at all.*' This language was quoted and approved by this court in Judson v. Lyford, 84 Cal. 507." (Italics ours.)

In *Bull v. Ford,* 66 Cal. 176, the Supreme Court said:

> "The conveyance to defendant being void, as against Alvarado's creditors, the creditors were authorized to levy upon and sell the property as if no conveyance had ever been made by their debtor. (Freeman on Executions, Section 136, and authorities there cited.) This, the creditor, under whom the plaintiff claims, did; and by virtue of that sale, the interest of Alvarado in the property became vested in the plaintiff."

In *Rohrbough v. Johnson,* 107 Cal. 144-149, the Supreme Court of California says:

> "It has been repeatedly held that a sale of personal property not accompanied by an immediate delivery and an actual and continued change of possession is fraudulent and void as to any creditor who was such during any of the time the property remained in the seller's possession, and that such property may be seized by such creditor in the hands of the buyer in the same manner as though there had been no attempted transfer by the debtor. Waterson v. Rodgers, 53 Cal. 401; Edwards v. Sonoma Valley Bank, 59 Cal. 148. This construction of said section is equally applicable to chattel mortgages other than those authorized by statute and the same rule must apply in determining what is an immediate delivery and actual and continued change of possession, viz: that these questions must be determined upon the facts of each particular case."

The purchaser at execution sale had on behalf of the creditor against whom the transfer is void, may assert his title in an appropriate action and may bring an

action to quiet title and set aside the fraudulent conveyance and thus remove the cloud cast on his title thereby.

12 *California Jurisprudence,* 1031, Section 72 citing:
Wangenheim v. Garner, 42 Cal. App. 332;
Scholle v. Finnell, 166 Cal. 546;
Chalmers v. Sheehy, 132 Cal. 459, and other cases.

We therefore conclude that the Trustee, with the title of the bankrupt to the property already conferred upon him by Section 70-A of the Bankruptcy Act. had a right under Section 70-E and Section 3440 of the Civil Code, to quiet title to and remove the cloud thereon by avoiding the transfer or mortgage made to the appellee Bay.

It was clearly the intention of Congress, in enacting the Bankruptcy Act, to place the Trustee in the most favored position, to the end that he might collect all of the bankrupt's assets, convert them into cash, and disburse the proceeds derived therefrom equally among all of the unsecured creditors of the bankrupt. This is evidenced by the fact that in 1910, as a result of a decision handed down by this Court in *York Manufacturing Company v. Cassell,* 201 U. S. 344, which held that the Trustee stood in the shoes of the bankrupt, and was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the Trustee's title accrued, it became evident that a serious weakness existed in the Bankruptcy Act. The amendment to Section 47-A of the Bankruptcy Act was therefore enacted vesting the Trustee, as to all property in the custody or coming into the custody of the Bankruptcy Court, with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings there-

on, and as to all property not in the custody of the Bankruptcy Court, with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. This amendment gave rise to the doctrine that the Trustee in Bankruptcy stands in the shoes of the most favored creditor of the bankrupt under the local law. In other words, it converted the Trustee into an "ideal" creditor, one might say, into all kinds of a creditor, for the benefit of all.

Farmers Co-operative Company v. Barlow, 202 Fed. 1008 D. C. N. D.;
In re Johnson, 212 Fed. 311 (D. C. Oklahoma);
Fuller v. Atlanta Bank, 254 Fed. 278 (C. C. A.);
Matter of Seward Dredging Co., 224 Fed. 225 (C. C. A.);
Interstate Bank & Trust Co. v. Brown, 235 Fed. 32 (C. C. A.);
In re Nelson, 191 Fed. 233 (D. C. S. D.)
In re Geiver, 193 Fed. 128 (D. C. S. D.);
In re Hartdagen, 189 Fed. 564 (D. C. Pa.)

Prior to the decision herein complained of, the overwhelming weight of authority throughout the United States has been that a Trustee in Bankruptcy, after taking title to property fraudulently transferred, as provided under Section 70-A of the Bankruptcy Act, had a right to step into the shoes of the most favored creditor under Section 47-A, and with himself constituted as an ideal creditor with a lien by legal or equitable proceedings, or an execution returned wholly unsatisfied, assail for the benefit of all creditors any and all void liens or fraudulent transfers, under either Section 70-E or Sections 67-A or 67-B of the Bankruptcy Act, as the in-

dividual case might require, coupled with the local law of the state under which the most favored creditor would have derived his right.

It is sufficient to support a decree if there were one creditor who could have set aside the conveyance.

Evans v. Wood (Idaho Supreme Court), 241 Pac. 609;

> "The test is whether there exists a class properly included in the language of the amendment and that of the Alabama registration act. It is conceded that a judgment creditor holding a lien by execution is such a class. The trustee therefore is vested with the right by the amendment and the registration act of that class to avoid unrecorded conditional sales."

In re Calhoun Supply Co., 189 Fed. 537 (U. S. Circuit Court, Alabama).

And that the Trustee may make any objection to an unrecorded or void conveyance or mortgage that a lien creditor might make has been repeatedly held by Circuit Courts of Appeal throughout the country. This doctrine was laid down by the United States Circuit Court of Appeals for the Ninth Circuit in the following cases:

Scandinavian American Bank v. Sabin, 227 Fed. 581;
Meier Frank Co. v. Sabin, 214 Fed. 231;
National Bank of Bakersfield v. Moore, 247 Fed. 913.

And by the United States Circuit Court of Appeals for the Seventh Circuit in:

In re Pittsburgh Big Muddy Coal Co., 215 Fed. 705.

Distribution of Proceeds

The first reported case in an appellate court involving the question of distribution was the *Matter of Kohler,* 159 Fed. 871, decided by the United States Circuit Court of Appeals for the Sixth Circuit in 1908. In that case an Ohio bankrupt had transferred to his wife, without consideration, certain shares of stock. The transfer was made two years prior to the filing of the petition in bankruptcy. At the time of the transfer he was indebted in the sum of $461,108.69. After the transfer he contracted additional debts amounting to $1,300,000.00, all of which indebtedness was scheduled in his bankruptcy proceeding. The Trustee in Bankruptcy was requested by certain creditors who had been affected by the transfer to bring suit to set it aside, but failed to do so. The creditors who had been affected by the transfer and whose claims had existed prior to it then brought suit. A compromise was finally effected by the Trustee under the direction of the Bankruptcy Court and the suit was settled for $29,100.00. This sum was paid to the Trustee and a controversy then arose as to how the recovery should be distributed. The creditors whose claims had existed prior to the fraudulent transfer contended that the entire sum should be distributed pro rata among them alone, while the creditors whose claims came into existence subsequent to the transfer contended that it should be distributed pro rata among all creditors of the bankrupt who had provable claims on file.

The Referee held that the fund derived from this litigation should be distributed among all of the creditors of the bankrupt. The District Court took a different

view than did the Referee, and, on the theory that the creditors whose claims came into existence after the fraudulent transfer had occurred, had in no way been defrauded, reversed the Referee and ordered the proceeds distributed pro rata among the creditors whose claims had accrued prior to the transfer. The matter was then taken to the United States Circuit of Appeals for the Sixth Circuit, and in reversing the District Court the Circuit Court of Appeals said:

> "It is apparent from the reading of the bankruptcy law, that one of its chief objects was to prevent fraudulent preferences and conveyances by providing means for setting them aside and distributing the proceeds equally among all the creditors. Special provisions are made with respect to preferred creditors. (Sections 60-A, 60-B.) Such provisions are also made with respect to liens. (Sections 67-A, 67-B, 67-C, 67-D and 67-E.) All these relate to preferences or liens taken within four months prior to the filing of the petition in bankruptcy. In all these cases, it is provided that the property covered by the conveyance or lien, 'shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right to such levy, attachment, judgment or other lien shall be preserved for the benefit of the estate.'
>
> "In Section 70, it is broadly provided that the trustee shall be vested, by operation of law with the title of the bankrupt, to all 'property transferred by him in fraud of his creditors.' It is apparent this provision applies to all property transferred by the bankrupt at any time in fraud of his creditors."

Further on the Circuit Court of Appeals says:

> "One object of the bankruptcy law is to prevent preferences and secure equality. The letter of the law, from which we have quoted, provides for an equal distribution. All the estate of a bankrupt is to go to the trustee. This includes preferences and property fraudulently conveyed. In our view, the strong objection to the construction of the lower court is that it provides a ready method of effectuating preferences. A man heavily in debt, and likely to go in deeper, in other words, insolvent, but yet in business, may convey a large part of his property to his wife. Having thus put out an anchor to windward, he has the satisfaction of knowing that if the conveyance stands, his wife is taken care of, but if it is set aside, the creditors existing then will be preferred over the later ones. There may be reasons why the bankrupt would like to prefer his earlier over his later creditors. If so, here is a method ready at hand for the purpose."

And in the opinion the Circuit Court of Appeals quotes with approval the doctrine laid down by the appellate division of the Supreme Court of New York *In the Matter of Gray*, 47 App. Div. 554, 62 N. Y. Supp. 618, 3 A. B. R. 647, in which it was held that the right of action to avoid alleged fraudulent transfers made more than four months prior to the petition in bankruptcy vests in the Trustee and holding that:

> "'In either case the avails must be distributed equally among the creditors.'"

The Circuit Court of Appeals closes the opinion with:

> "The judgment of the lower court is reversed and

the cause remanded with directions to order the distribution of the money referred to among *all* the creditors." (Italics ours.)

The foregoing decision covers a case identically in point with the present case except in the Kohler case there were only two classes of creditors instead of three. The reasoning of the court in the Kohler case, however, seems to be very logical, and we believe that it correctly states the law.

In *Mullen v. Warner,* 11 Fed. 2nd. 62, the United States Circuit Court of Appeals for the Fourth Circuit said:

"The contention of the petitioner is that since in the absence of bankruptcy, only antecedent creditors could have avoided the conveyance; and since because of the intervention of bankruptcy the trustee was substituted for such creditors to secure rights which would have inured to their benefit alone, the recovery by the trustees should be held to be for their exclusive benefit and that subsequent creditors, who could not have set aside the conveyance, should not be allowed to participate in the recovery. While there is much that is plausible in this contention, it is not supported by the provisions of the Bankruptcy Act. Undoubtedly the right of the trustee to set aside the conveyance existed because of the right of antecedent creditors to avoid same; but this right was derived from Section 70-E, of the Bankruptcy Act, which provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided and may recover the property so transferred, but makes no provision for the holding of the property recovered by the avoidance of such transfer for any par-

ticular creditor or class of creditors. To hold that the recovery by the trustee in such a case should go to the antecedent creditors alone instead of being held for distribution under the general provisions of the act, would be to read into the statute a provision which Congress has not enacted and one which we think is at variance with the spirit of the statute as embodied in its other provisions.

"The Bankrupcy Act contemplates an equal division among the bankrupt's creditors with no preferences except those specifically designated in the statute. It is accordingly provided by section 67-B that whenever a creditor is prevented by the bankruptcy from enforcing his rights as against a lien created by his debtor the trustee shall be subrogated to and enforce the right of such creditor *for the benefit of the estate.* Can it be that when the trustee avoids a *lien* through subrogation to the right of a creditor he does so for the benefit of the estate, but when he avoids a *fraudulent conveyance,* he does so for the exclusive benefit of such creditor? We think not. Such a distinction would certainly seem to be repugnant to be presumed intention of the act and we think that it is repugnant also to its express provisions. It is true that the words 'for the benefit of the estate' were not added to section 70-E as they were to 67-B, but the addition of these words was not necessary. The power vested in the trustee by Section 70-E is the power not only to avoid the fraudulent conveyance but to recover the property conveyed. In the absence of contrary provisions this recovery would be presumed to be for the benefit of the estate. But the matter is not left to presumption, for Section 70-A expressly vests the trustee with property transferred by the bankrupt in fraud of creditors. The antecedent creditors have

no lien upon the property or the fund realized from it, their right in the absence of bankruptcy being merely the right to set aside the fraudulent conveyance and subject the property to levy under execution. The Bankruptcy Act gives them no preference. Consequently the recovery by the trustee is held for distribution in accordance with section 65 of the Act, which makes no distinction between antecedent and subsequent creditors, but provides that 'Dividends of an equal percentum shall be declared and paid on all allowed claims.' The whole confusion as to the right of antecedent creditors arises from assuming that, because the conveyance is avoided under the state law, the fund realized must be distributed under that law, a view expressly repudiated by the Supreme Court of the United States in Miller v. New Orleans Acid & Fertilizer Co., 211 U. S. 496, 21 Am. B. R. 416, 29 S. Ct. 176.

"A decision which seems to us conclusive of the question presented is the case of Globe Bank v. Martin, 236 U. S. 288, 34 Am. B. R. 162, 35 S. Ct. 377. In that case there was a fraudulent conveyance which, under the laws of Kentucky, was void as to antecedent but not as to subsequent creditors. A suit to set aside the conveyance was instituted by antecedent creditors and under the Kentucky practice an attachment levied upon the property which was the subject of the suit. During the pendency of the suit and within four months after its institution the debtor was adjudged bankrupt, and the bankruptcy court entered an order directing that the attachment lien be preserved for the benefit of the estate and that the trustee intervene in the state court and prosecute an action for the recovery of the property. This was done and the property recovered. A decree adjudging that the antecedent

creditors were entitled to the entire fund was reversed by the Circuit Court of Appeals of the Sixth Circuit and a decree was entered by that court directing a distribution of the fund among all the creditors of the estate. This was affirmed on appeal to the Supreme Court of the United States.

"It is argued by counsel that a distribution among all the creditors was directed in the case of Globe Bank v. Martin, supra, because the trustee sought to preserve the lien obtained by creditors, under section 67-F of the Act, for the benefit of the estate. But we do not understand this to be the basis of that decision. The court points out that the trustee is by 70-A of the Bankruptcy Act vested with title to property transferred in fraud of creditors, and that by 70-E he is authorized to avoid any transfer by the bankrupt which any creditor may avoid. It next shows that the antecedent creditors had no lien on the property conveyed until the filing of the attachment and that the lien of the attachment was void, having been filed within four months of the bankruptcy, except as it was preserved under 67-F for the benefit of the estate. Miller v. New Orleans Acid & Fertilizer Company, supra, was cited as authority for the proposition that after the fraudulent conveyance was set aside *under section 70* of the Bankruptcy Act, the bankruptcy court had the right to determine for itself the disposition of the fund. In our opinion the doctrine announced in Globe Bank v. Martin clearly covers the distribution of funds recovered by the Trustee in proceedings under 70-E of the Bankruptcy Act, whether a lien obtained by creditors is preserved under 67-F or not."

In *Campbell v. Dalbey,* 11 Fed. 2nd. 62, the United States Circuit Court of Appeals for the Fourth Circuit said:

> "As stated in the former opinion of this case, the trustee, even though the right to preserve the lien under Section 67-F had been lost, had the right to avoid under Section 70-E any transfer by the bankrupt which any creditor might have avoided. The bank's suit was brought within one year from the giving of the mortgage, and was not prescribed by the state law (La. Revised Civil Code, art. 1987); and the judgment of the state court which set aside that mortgage in so far as it affected the bank is authorized by article 1977 of that code. It follows from section 70-E that the trustee not only succeeded to the bank's right to avoid appellant's mortgage to the partial extent that it affected the bank, *but also was given the authority to avoid that mortgage fully and completely and recover the entire mortgaged property or its value, for the benefit of all the creditors of the bankrupt.* Stellwagen v. Clum, 245 U. S. 605.
>
> "The judgment is affirmed." (Italics ours.)

In *Cohen v. Schultz,* 43 Fed. 2nd. 340, the United States Circuit Court of Appeals for the Third Circuit, as late as August 28, 1930, passed on this question. One Aurelio Conforti and his wife on January 5, 1928, transferred certain properties to a third party. On the same day one Jacob Schultz, a creditor, docketed a judgment for $446.64 against him. On January 19, 1928, Schultz docketed another judgment against him for the sum of $1255.43. On June 22, 1928, Conforti filed a voluntary petition in bankruptcy and Cohen was elected trustee.

The trustee filed a suit to set aside the conveyance by the bankrupt and the suit was finally settled for $5000.00. Schultz, as a creditor, then insisted that he had a right to a lien against the proceeds of this settlement to the extent of his judgments because of the fact that by virtue of his judgments against the bankrupt he had a right to have set aside the fraudulent transfers made by the bankrupt, and the District Court entered an order in his favor. On appeal the United States Circuit Court of Appeals for the Third Circuit, in reversing the District Court, said:

> "It is upon the $5,000 thus received by the trustee that the appellee is here trying to impress the liens. Does Schultz by virtue of his judgments against the bankrupt, which he did not attach to the real estate in question, have a lien against the settlement affected by the trustee in the litigation to set aside the mortgage? We know of no principle of law, decisional or statutory, which gives him such a lien. * * *
>
> "Section 70-A of the Bankruptcy Act (11 U. S. C. A., Sect. 110-a) expressly vests the trustee with property transferred by the bankrupt in fraud of creditors. Antecedent creditors have no lien upon the property thus conveyed or the fund realized from it. Their right is merely the right to set aside the fraudulent conveyance and subject the property to levy under execution. The Bankruptcy Act does not give them preference. Consequently the recovery by the trustee is held for distribution to creditors generally with no preferences, except those specially designated in the statute, and Schultz is not one of those creditors. So it does not appear that the appellee could impress his lien upon the $5,000

even if the transfer had been fraudulent, and since it has not been so declared, he has no claim whatever to a preference. Mullen v. Warner (C. C. A., 4th Cir.), 11 Fed. 2nd. 62, Globe Bank v. Martin, 236 U. S. 288."

In *Globe Bank v. Martin*, 236 U. S. 288, this Court said:

"It is contended, however, by the appellants, that if we assume that under section 67-F of the Bankruptcy Act, the property or its proceeds must come to the trustee, to be distributed by him under the orders of the bankruptcy court for the benefit of the estate that inasmuch as, under the statute of Kentucky, creditors existing prior to the making of the deed in question were entitled to be preferred in the distribution of the proceeds, that right is protected by sub-section 5 of section 64-b of the Bankruptcy Act, which provides that the debts to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others,

> 'debts owing to any person who, by the laws of the states or the United States, is entitled to priority;'

and it is contended that this sub-section, as considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion written by the late Justice Lurton (Re Bennett, 18 Am. B. R. 320, 82 C. C. A. 531, 153 Fed. 673), maintains that position. But an examination of that case shows that it dealt with a statutory lien created under section 487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplies to manufacturing companies, and creating a lien upon the property in

cases of such companies in case of an assignment for the benefit of creditors, or where the property is distributed among the creditors by operation of law or by act of the company. It was held that such statutory lien gave a substantial right in or inchoate lien upon the property from the date of furnishing the material, within the spirit and meaning of section 64-B, sub-section 5, of the Bankruptcy Act. That case, and such cases as Re Laird (C. C. A., 6th Cir.), 6 Am. B. R. 1, 48 C. C. A. 538, 109 Fed. 550, which dealt with labor claims, recognize the purpose of Congress in passing Section 64-B, to maintain statutory liens and preferences in such cases in the distribution of the bankrupt estate.

"We are unable to see that the case has any bearing upon the construction of section 67-F and the cases now under consideration. Under our system of bankruptcy, and in the administration of assignments under State laws, there are certain persons, such as those furnishing material or labor, that, in certain specific ways, are given preference in the distribution of insolvent estates. It is a statutory lien of that kind with which the court dealt in Re Bennett."

The foregoing decisions of various Circuit Courts of Appeal, together with the doctrine laid down by this Court in *Globe Bank & Trust Co. v. Martin*, supra, in our opinion conclusively establishes the fact that the Circuit Court of Appeals for the Ninth Circuit erred in holding that the Trustee was required to distribute the avails of the recovery to the first two classes of creditors who would have had a right to avoid the transfer or mortgage had they obtained judgments against the bankrupt and had bankruptcy not intervened.

In addition, we are unable to see how the Circuit Court of Appeals reconciled its holding in the instant case with the plain statutory provision of Section 65-A of the *Bankruptcy Act*, which provides that:

> "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Section 64-B of the Bankruptcy Act expressly sets forth the claims of creditors which have priority over others and the only classification under which creditors of the first and second class could have hoped to come are under the seventh classification of Section 64-B as creditors holding "debts owing to any person who by the laws of the states or the United States is entitled to priority," and this Court in its decision in the case of *Globe Bank &Trust Co. v. Martin,* supra, forever closed that door to them. We therefore submit that on this ground alone, if no other, the decision of the Circuit Court of Appeals in this case should be reversed.

There is one other question, however, arising which is of equal importance and that is the question of the extent of the trustee's rights in his recovery. Does he avoid it, *in toto*, or does he avoid it merely to the extent of the amount of creditor's claims existing at the time of the transfer or mortgage complained of? If the former is true, the chattel mortgage for $10,000 given to Sylvan G. Bay is wholly null and void so far as the Trustee in Bankruptcy is concerned. If the latter is true, as the Circuit Court of Appeals decided, then we are back again in the same situation wherein the holder of a mortgage denounced by a state statute to be con-

clusively presumed to be fraudulent and void as to certain creditors can still come in ahead of general creditors of the bankrupt. In other words, assuming for the sake of argument that the property was worth $13,000, that the claims of creditors entitled to avoid the mortgage amounted to $2,000, the Trustee would then be permitted to avoid the mortgage to the extent of $2,000, the recovery would go into the general fund for the benefit of all creditors to apply on a dividend and before the Trustee could disburse any of the funds in excess of $2,000 to general creditors, he would be obliged to pay the $10,000 mortgage in full. If there were any leavings after the mortgage had been paid, these leavings would then go to the creditors of the bankrupt. This we do not believe to be the law any more than we believe it to be the law that the recovery made by the Trustee is made for the benefit only of the creditors affected by the fraudulent transfer.

Section 67-A of the *Bankruptcy Act* provides that:

> "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt *shall not be liens against his estate.*" (Italics ours.)

Section 67-B provides that:

> "Whenever a creditor is prevented from enforcing a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor *for the benefit of the estate.*" (Italics ours.)

In the case at bar, the creditors of the first and second classes could have seized the mortgaged property, caused an execution to be levied upon it, and at execution sale could have obtained a perfect title to the property as against the attempted lien of the mortgagee.

Judson v. Lyford, 84 Cal. 507;
Butler v. San Francisco Gas & Electric Co., 168 Cal. 32;
Bull v. Ford, 66 Cal. 176;
Watson v. Rodgers, 53 Cal. 401;
Brown v. O'Neal, 95 Cal. 262-267.

Under Section 47-A of the Bankruptcy Act the Trustee, standing in the shoes of a creditor holding a lien by legal or equitable proceedings and in his artificial, statutory status as an execution creditor with a judgment returned wholly unsatisfied, is subrogated under Section 67-B to the rights of these two classes of the most favored creditors under the local laws of California. It is our contention then, that the Trustee has a right, the same as would the creditors in class one and class two, to wholly avoid the attempted lien on the property of the bankrupt.

Chalmers v. Sheehy, 182 Cal. 459.

In *Campbell v. Dalbey,* 23 Fed. 229, the United States Circuit Court of Appeals for the Fifth Circuit says:

> "It follows from Section 70-E that the trustee not only succeeded to the bank's right to avoid appellant's mortgage to the partial extent that it affected the bank, but also was given the authority to avoid that mortgage *fully and completely and recover the*

> *entire mortgaged property or its value* for the benefit of all the creditors of the bankrupt. Stellwagen v. Clum, 245 U. S. 605. (Italics ours.)

The foregoing decision is of particular interest because of the fact that in it the United States Circuit Court of Appeals for the Fifth Circuit completely reversed the position formerly taken by it in *American Trust & Savings Bank v. Duncan,* 250 Fed. 780, back in 1918. In *American Trust & Savings Bank v. Duncan* the United States Circuit Court of Appeals for the Fifth Circuit held that the avails of a successful suit by a Trustee to avoid a fraudulent transfer under Section 70-E inured only to the benefit of the creditor or creditors affected by the transfer. That decision stood alone until December, 1927, at which time the decision in *Campbell v. Dalbey* was handed down. In the latter decision the United States Circuit Court of Appeals for the Fifth Circuit completely reverses its former position and fell in line with the other circuits which had passed on that question. In fact, the lone dissenting authority of *American Trust & Savings Bank v. Duncan* was criticised by the United States Circuit Court of Appeals for the Fourth Circuit in *Mullen v. Warner,* 11 Fed. 2nd. 62, in the following language:

> "We have examined carefully the case of American Trust Company v. Duncan, 254 Fed. 780, cited by counsel and it apparently supports the decree rendered below; but while we have great respect for the court which rendered that decision, we cannot follow it. The doctrine therein announced is at variance with our interpretation of the Bankruptcy Act and, it seems to us, is in clear conflict with the

decision of the Supreme Court of the United States in Globe Bank v. Martin, supra. Our examination of the authorities from other jurisdictions convinces us also that the decision in American Trust Co. v. Duncan is not in harmony with the current of authority; for it seems to be generally settled that the recovery of the trustee of property conveyed in fraud of creditors inures to the benefit of all creditors and not merely to the benefit of those who might have attacked the conveyance under the state law. Kehr v. Smith, 20 Wall 31; Platt v. Mead, 9 Fed. 91; McCrory v. McDonald (Miss.) 80 So. 643; Riggs v. Price (Mo.), 43 A. B. R. 413; In re Kohler, 159 Fed. 871; Farmers' Co-operative Co. v. Barlow, 202 Fed. 1008; In re Gray, 47 App. Div. 554."

Whether or not the fact that the Circuit Court of Appeals for the Fifth Circuit found itself entirely out of harmony with other appellate courts was the motivating cause, we do not know, but the fact remains that in 1927 that Court unqualifiedly held in *Campbell v. Dalbey*, supra, that the Trustee had a right to avoid an invalid mortgage, not to the partial extent that it affected the creditor whose rights had been invaded, but *"fully and completely* and recover the entire mortgaged property or its value for the benefit of all creditors of the bankrupt." (Italics ours.)

In *Farmers' Co-operative Company v. Barlow*, 202 Fed. 1008, the District Court of the United States for the District of North Dakota, speaking through Judge Amidon, said:

"The trustee in bankruptcy derives his rights and powers from the statute, and not from the creditors

of the estate. If any creditor under the local statute can obtain priority over an unfiled or unrecorded instrument by levy of attachment or execution, the trustee in bankruptcy, under section 47 as amended, has all the rights and remedies of such creditor * * * To hold that the trustee derives his rights from the creditors of the particular estate, instead of the statute, would greatly embarrass the administration of the estate in bankruptcy. It would require first an investigation to ascertain what credit was given subsequent to the unrecorded instrument. This in mercantile cases would be a difficult inquiry, and would often require the splitting of current accounts. Again, under this interpretation, the fund arising from the property covered by the unrecorded instrument would have to be first apportioned among the subsequent creditors, to the exclusion of all other creditors, then to the lien-holder, and finally to the general creditors. In re Riehl, 200 Fed. 455. I do not think that Congress, by the 1910 amendment of section 47, intended such a result. A fair interpretation of the statute in the light of the weight of authority, as above pointed out, gives to the trustee all the rights of the most favored creditor under the the local law, and any property thus held by the trustee becomes a part of the general estate to be apportioned among all creditors in accordance with the provisions of the Bankruptcy Act on that subject."

The Supreme Court of California in *Noyes v. Bank of Italy*, 206 Cal. 266, says:

"Section 47-A-2 of the Bankruptcy Act, June 25, 1910 (Chap. 412, sec. 8, 36 Stats. at Large, 838, 840; Comp. Stats. 1913, Secs. 9586, 9631; U. S. Code (U. S. C. A.), title 11, sec. 75), provides:

'And such trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.'

"Interpreting said section 47-A-2 of the Bankruptcy Act the Supreme Court of the United States has held that the trustee acquired a lien status as of the time when the petition in bankruptcy was filed. (Bailey v. Baker Ice Machine Co., 239 U. S. 268; 36 Sup. Ct. Rep. 50); (see also Martin v. Commercial National Bank, 245 U. S. 513; 38 Sup. Ct. Rep. 176, see also Rose's U. S. Notes, 4 Cal. Jur., pp. 59, 60, 62, 63, and cases cited.)"

Further down the Court says:

"In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceedings, be entitled to attack the alleged void mortgage and to enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc. I Collier on Bankruptcy, 12th ed., p. 728, et seq."

The Supreme Court of California also passes on the question as to the position of the Trustee in stepping into the shoes of creditors whose claims came into existence between the date of the execution of the mortgage and its recordation. In that regard the Court says:

"The term *creditors* is general and applies to creditors existing prior to the mortgage, as well as

subsequent." Citing *Cardenas v. Miller,* 108 Cal. 250.

The Supreme Court of California also discussed the doctrine laid down by the United States District Court for the Southern District of California in the *Matter of Hansen,* 268 Fed. 904, in which the United States Judge Bledsoe decreed a chattel mortgage withheld from recordation twenty-one (21) days after its acknowledgment to be null and void in so far as creditors were concerned.

See also:

Pierson v. Hickey, 16 S. D. 46;
Butler v. San Francisco Gas Co., 168 Cal. 32;
Bull v. Ford, 66 Cal. 176;
Oliver v. Bennan, 292 Fed. 201.

In *Willamette Casket Co. v. Cross Undertaking Co.,* 12 Wn. 190, the Supreme Court of Washington, construing a statute similar to Section 2957 of the Civil Code of California, used almost identically the same language as was used by the Supreme Court of California in *Noyes v. Bank of Italy, supra,* in sum and substance holding that a chattel mortgage withheld from record an unreasonable length of time was void not only as to subsequent creditors, but to prior creditors, and even went so far as to hold that creditors who became such subsequent to the filing of the chattel mortgage were entitled to a superior right over the mortgage. This decision was followed in a subsequent case, *Manhattan Trust Co. v. Seattle Coal & Oil Company,* 16 Wn. 499, and was quoted with approval by the United States Circuit Court of Appeals for the Ninth Circuit in *Pacific State Bank v. Coats,* 205 Fed. 618.

Furthermore, it strikes us that the Circuit Court of Appeals for the Ninth Circuit has in the case at bar sought to divest the trustee of title to property which is expressly conferred upon him by Section 70-A of the *Bankruptcy Act*. Under that section the trustee takes title to all property transferred by the bankrupt in fraud of his creditors and to all property which prior to the petition he could have by any means transferred or which might have been levied upon and sold under judicial process against him. Under Section 3440 of the *Civil Code* of California and the California decisions hereinbefore cited, *Judson v. Lyford*, 84 Cal. 507, et seq., this property could have been levied upon and sold by any of the creditors in class one and class two and certainly it was property transferred in fraud of creditors. But under the decision of the United States Circuit Court of Appeals for the Ninth Circuit in this case, the trustee is deprived of title to that property, at least to the partial extent of the amount of the void encumbrance against it.

Section 70-E of the *Bankruptcy Act* has been a part of the Act since its origin. It seems peculiar that Congress in enacting this section would specifically provide that "the trustee may avoid *any* transfer by the bankrupt of his property which *any* creditor of such bankrupt might have avoided and *may recover the property so transferred, or its value, from the person to whom it was transferred,*" if it were the intent of the framers of the law that the trustee could avoid transfers only to the extent of the amount of creditors' claims affected by them. It would seem to us that if such had been the

intention of Congress, Section 70-E would have been made to read:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided *to the extent of the amount of the claims of such creditor or creditors and may recover the property so transferred to the extent of the amount of such claims from the person to whom it was transferred, etc.*" (Italics ours.)

This, Congress has not seen fit to enact, but, on the contrary, in 1910 strengthened Section 70-E by placing a trustee in the status of an execution creditor under the amendments to Section 47-A. It therefore appears to us that the Circuit Court of Appeals for the Ninth Circuit has read into the Act provisions that were neither intended by the original framers of the Act, nor by the Congress which subsequently amended and strengthened the Act in 1910, to place the trustee in the most favorable position possible, with regard to transfers that were fraudulent at law or in fact.

We therefore respectfully submit that the Circuit Court of Appeals for the Ninth Circuit erred in two particulars, first, in holding that the trustee's rights were limited by the amount of claims affected by the fraudulent transfer, and second, by holding that the recovery under those limited rights was only for the benefit of the favored class of creditors affected thereby. We respectfully submit that for these reasons the judgment of the Circuit Court of Appeals should be reversed and the cause sent back to the District Court with directions to affirm the original order of Referee Rupert B.

Turnbull, setting aside the mortgage *in toto* and distributing the avails to all the creditors of the bankrupt.

Conclusion

The importance of the questions herein involved cannot be exaggerated. If the lone dissenting decision of the Circuit Court of Appeals for the Ninth Circuit is permitted to stand as against four other circuits to the contrary, it will lead to unconscionable possibilities. If a trustee in bankruptcy is limited in avoidance of fraudulent transfers and liens to the amount of creditors' claims affected thereby, the gate will be left wide open for bigger and better frauds. Under such a rule, a bankrupt could own a large business block or office building in downtown Los Angeles, San Francisco or Portland. The building could be worth $3,000,000 and he could owe $50,000 in debts. At a time when he owed indebtedness in the comparatively small sum of $50,000 he could quietly transfer this building to his wife or a friend, without consideration, record the transfer, and continue incurring indebtedness with eastern creditors, who, while they might have constructive notice of the transfer, would actually know nothing about it. He could pile up three or four hundred thousand dollars in debts and file a petition in bankruptcy. When the trustee was elected and attacked the voluntary transfer, the bankrupt's fraudulent grantee could with impunity go on the witness stand and under examination admit to the trustee that the transfer had been made to him, or her, voluntarily and for the express purpose of delaying and defrauding the bankrupt's creditors. The fraudulent grantee could then tender the trustee the sum of $50,000, the amount

of the claims of the creditors defrauded, and the trustee would be compelled to turn over to him the fruits of his fraud over and above $50,000 and see him walk insolently away from the court leaving three hundred thousand dollars' worth of creditors without recourse or redress from the property so fraudulently transferred, and this, notwithstanding the fact that Section 70-A of the *Bankruptcy Act* expressly vested the trustee by operation of law with "title to all property transferred by the bankrupt in fraud of his creditors and title to all property which prior to the filing of the petition could have been levied upon and sold under judicial process against him."

True, it may be said that in the case at bar there is no question of actual fraud involved, and that the fraud involved here is merely constructive, but in avoiding transfers under Section 70-E of the *Bankruptcy Act,* it is immaterial whether or not the transfer was actually fraudulent or constructively so, and it can be avoided even though a full consideration were paid.

Brown v. Kossove, 255 Fed. 806.

And such transfers are decreed void, regardless of individual hardship or the best of good faith existing between the parties.

Brown v. O'Neal, 95 Cal. 262-267.

And although the transfer in question is merely constructively fraudulent, we see no distinction between a constructively fraudulent transfer and one that is actually fraudulent in fact. Actual fraud is extremely difficult to prove and the burden of proof where fraud is involved is much heavier than is the burden of proof in an ordi-

nary civil case. Fraud is never presumed, and in order to prove actual fraud, a trustee in bankruptcy is at an extreme disadvantage, usually having relatives and friends of the bankrupt as his sole and only witnesses. However, in any case of actual fraud there are usually elements involved which run afoul of statutes of the state which make certain acts in connection with transfers conclusively presumptive of fraud. It is to facilitate this proof that such statutes were enacted. They were intended to place creditors and trustees less at the mercy of the scheming debtor.

Woods v. Bugbey, 29 Cal. 467-477.

Section 3440 of the *Civil Code* of California is a fair example of such a statute. (*Woods v. Bugbey*, supra.) It was enacted for the purpose of assisting creditors and persons on whom the estate of the debtor devolved in trust, and for the purpose of circumventing schemes devised by calculating debtors. If by judicial construction the effectiveness of statutes such as Section 3440 and Section 70-E of the *Bankruptcy Act* is impaired, conscientious and energetic trustees in bankruptcy, deprived of these effective weapons, will be literally hamstrung in their efforts to compel an accounting from actually fraudulent grantees of dishonest bankrupts. (*Woods v. Bugbey*, supra.) Such trustees will wage battle armed with wooden swords against the sharpened rapiers of fraudulent schemers who seek to unload their debts and at the same time skilfully conceal their property with the aid of relatives and friends.

We do not feel that this Court will uphold such a construction of an Act which is designed to relieve misfortune, but which, in order to secure the benefit thereof, requires the "utmost honesty on the part of the bankrupt."

In re Becker, 106 Fed. 54;
In re Merritt, 28 Fed. (2d) 679.

Respectfully submitted,

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Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 27.—October Term, 1931.

Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Petitioner, *vs.* Q. S. Bay. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 2, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

The bankrupt executed a mortgage of automobiles, furniture, show room and shop equipment that is admitted to be bad as against creditors who were such at the date of the mortgage and those who became such between the date of the mortgage and that on which it was recorded, there having been a failure to observe the requirements of the Civil Code of California, § 3440. The question raised is whether the mortgage is void also as against those who gave the bankrupt credit at a later date, after the mortgage was on record. The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. Whether the Court was right must be decided by the Bankruptcy Act since it is superior to all state laws upon the subject. *Globe Bank* v. *Martin*, 236 U. S. 288, 298.

The trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors or which prior to the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. Act of July 1, 1898, c. 541, § 70; U. S. Code, Title 11, § 110. By § 67, Code, Title 11, § 107 (a), claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. The rights of the trustee by subrogation are to be enforced for the benefit of the estate. The Circuit Courts of Appeal seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that

what thus is recovered for the benefit of the estate is to be distributed in "dividends of an equal percentum on all allowed claims, except such as have priority or are secured." Bankruptcy Act, § 65, Code, Title 11, § 105. *In re Kohler*, 159 Fed. 871. *Mullen* v. *Warner*, 11 F. (2d) 62. *Campbell* v. *Dalbey*, 23 F. (2d) 229. *Cohen* v. *Schultz*, 43 F. (2d) 340. *Globe Bank & Trust Co.* v. *Martin*, 236 U. S. 288, 305.

Decree reversed.

A true copy,

Test:

Clerk, Supreme Court, U. S.